DOCKET

No. 84-5004-CFY
Status: GRANTED

Title: Truman Lewis Ball, Petitioner
v.
United States

Docketed:
July 6, 1984

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Widener, Jo S.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 26 1984		Record filed.
4	Jul 26 1984		Certified original record, 3 volumes, received.
5	Aug 9 1984		Brief of respondent United States in opposition filed.
6	Aug 16 1984		DISTRIBUTED. September 24, 1984
7	Aug 30 1984	X	Reply brief of petitioner Truman L. Ball filed.
9	Oct 1 1984		Petition GRANTED.
			**********
10	Oct 13 1984	G	Motion of petitioner for appointment of counsel filed.
11	Oct 29 1984		Motion for appointment of counsel GRANTED and it is ordered that Jo S. Widener, Esq., of Bristol, Virginia is appointed to serve as counsel for the petitioner in this case.
12	Nov 15 1984		Brief of petitioner Truman L. Ball filed.
13	Dec 4 1984		SET FOR ARGUMENT. Wednesday, January 9, 1985. (2nd case).
14	Dec 12 1984		Joint appendix filed.
16	Dec 14 1984		Order extending time to file brief of respondent on the merits until December 20, 1984.
19	Dec 19 1984	G	Motion of the Solicitor General to permit Andrew J. Pincus, Esquire, to present oral argument pro hac vice filed.
20	Dec 19 1984	X	Brief of respondent United States filed.
21	Jan 7 1985		Motion of the Solicitor General to permit Andrew J. Pincus, Esquire, to present oral argument pro hac vice GRANTED.
22	Jan 9 1985		ARGUED.
23	Dec 31 1984	X	Reply brief of petitioner Truman L. Ball (REPRINTED) filed

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PETITION FOR WRIT OF CERTIORARI

Case No. 84-5004

IN THE

SUPREME COURT

OF THE

UNITED STATES

RECEIVED
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SUPREME COURT, U.S.

OCTOBER, 1984 TERM

TRUMAN LEWIS BALL

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT

OF THE

UNITED STATES

TRUMAN LEWIS BALL

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI

---

a. QUESTION PRESENTED FOR REVIEW

Is the United States permitted to convict and sentence a convicted felon under both 18 U.S.C. Sections 922(h)(1) and 1202(a)(1) where the unlawful receipt of the firearm under Section 922(h)(1) was incidental to unlawful possession of the same gun?

b. The caption of the case in this Court contains the names of all the parties to the proceeding.

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d. The case is reported below as United States v. Ball, No. 83-5253, 734 F.2d 965 (4th Cir. May 8, 1984).

The case was tried to a jury and there is no official or unofficial report or opinion of the case in the district court.

e. The decision of the Court of Appeals for the Fourth Circuit here sought to be reviewed is dated May 8, 1984 and the said decision was filed on that same date. No petition for rehearing was filed in the Court of Appeals for the Fourth Circuit, and no extension of time was requested to file this petition.

This is not a cross petition for a writ of certiorari.

The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. Section 1254(1).

f. The constitutional provisions and statutes which this case involves are:

United States Constitution, Amendment V :

/. . .nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

18 U.S.C. Section 922(h)(1):

It shall be unlawful for any person (1) . . . who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm /. . . which has been shipped or transported in interstate . . . commerce.

18 U.S.C. Section 924(a):

Whoever violates any provision of this chapter [which includes Section 922 (h)(1)] . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both . . .

18 U.S.C. App. Section 1202(a)(1):

Any person who (1) has been convicted by a court . . .of a State . . . of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce. . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

g. and i. STATEMENT OF THE FACTS AND THE CASE

One day in the summer of 1982, Petitioner Ball was among the passengers in an automobile, on the back seat of which was a nickel plated Rossi revolver which had previously been shipped from South Carolina to Honaker, Virginia where it was sold to Hubert Romans, the owner of the car. The following day Romans reported to the Sheriff's office that the gun was missing.

The United States proved Ball had possession of this gun on three occasions : when he found the gun in a bag of beer; when he pointed it at Clarence Musick; and when sherriffs arrested him at Gary Musick's house and saw the guh in his back pocket.

The record does not show the exact date when Ball found the gun in the bag of beer, but the other two incidents of possession occurred on June 11, 1982.

Ball had previously been convicted of a crime punishable by more than one year.

Pursuant to jurisdiction under 18 U.S.C. Section 3231, Truman Lewis Ball was tried and convicted on September 28, 1983 by a jury under a two count indictment for violating 18 U.S.C. Section 922 (h)(1), receipt of a firearm shipped in interstate commerce by a convicted felon, and 18 U.S.C. App. Section 1202 (a)(1), possession of a firearm in commerce and affecting commerce by a convicted felon.

The judgment and conviction order dated October 3, 1983 sentenced Ball to three years imprisonment for receipt under Section 922(h)(1) and to two years imprisonment for possession under Section 1202(a)(1). The two year sentence was suspended in favor of two years probation "to commence upon defendant's release from confinement as to Count 1."

Ball appealed to the United States Court of Appeals for the Fourth Circuit requesting that one of his convictions and its corresponding sentence be vacated, contending that conviction under both statutes for the same act violated the intent of Congress in passing these statutes, and the double jeopardy clause. The Court of Appeals refused to vacate one of the convictions, but instead, following its own precedent in United

States v. Burton, 629 F.2d 975 (4th Cir. 1980), reversed and remanded with instructions to modify the sentences so as to make them run concurrently.

h. This is not a review of a judgment of a state court

J. ARGUMENT

I.

In 1979 this Court decided United States v. Batchelder, 422 U.S. 114 (1979) involving two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968, namely 18 U.S.C. Section 922 (h)(1) of Title IV of the Act and 18 U.S.C. App. Section 1202(a)(1) of Title VII of the Act which was a "last minute floor amendment, hastily passed with little discussion, no hearings and no report." 442 U.S. at 120.

In Batchelder a convicted felon was found guilty of receiving a gun that had traveled in interstate commerce in violation of Section 922(h)(1) and was sentenced under Section 924 of the Act to five years imprisonment. The Court of Appeals affirmed the conviction but remanded for resentencing under Section 1202(a)(1) erroneously reasoning that Congress implicitly repealed the five year punishment authorized in Section 924 by amending the Act with Section 1202(a)(1)'s more lenient maximum punishment of two years imprisonment.

The Supreme Court in reversing the Seventh Circuit held that Congress intended instead "to enact two independent gun control statutes, each fully enforceable on its own terms." 442 U.S. at 119. Although these two sections provide different penalties for essentially the same conduct, the Court said, Section 1202(a)(1) cannot be interpreted as implicitly repealing Section 924. The Court went on to say that "when a defendant's act violates more than one criminal statute the Government may prosecute under either so long as it does not discriminate against any class of defendants." 442 U.S. at 123.

Whether or not the government can prosecute under both statutes for a single act is the question upon which petitioner's case turns and is a question upon which the Courts of Appeals

have rendered conflicting decisions.

The Courts of Appeals decisions on this question reach three different results. The Fifth and the Eighth Circuits construe Batchelder as saying that when an act violates more than one statute the government may prosecute under either Section 922(h)(1) or 1202(a)(1), but not both. United States v. Larson, 625 F.2d 67 (5th Cir. 1980); United States v. Gardner, 605 F.2d 1076 (8th Cir. 1979).

The Tenth Circuit, by contrast, holds that the government may prosecute, convict and sentence under both Sections 922 (h)(1) and 1202(a)(1) for the same act. United States v. Larranaga, 614 F.2d 239 (10th Cir. 1980). The Fourth Circuit takes a third position in the construction of the same statutory provisions and Batchelder. It permits conviction and sentencing for the same act under both Sections 922 (h)(1) for receipt and 1202(a)(1) for possession, as long as the sentences run concurrently rather than consecutively. United States v. Burton, 629 F.2d 975 (4th Cir. 1980). The case at bar, of course, was decided in accordance with Burton.

The above analysis concerns only the two specific statutes here under consideration, namely Sections 922(h)(1) and 1202(a)(1). The Circuits have, however, applied their diverse interpretations of the Batchelder principle to other provisions of the Omnibus Crime Control and Safe Streets Act where one act violates two statutes. See, United States v. Wiga, 662 F.2d 1325 (9th Cir. 1980) involving Sections 922(g)(1), transporting a firearm, and 1202(a)(1), possessing a firearm, which follows the Fifth Circuit view of Batchelder. In accord, United States v. Girst, 636 F.2d 316 (D.C. Cir. 1979), also involving Sections 922 (g)(1) and 1202(a)(1); and United States v. Ivy, 644 F.2d 479 (5th Cir. 1981) also involving Sections 922(g)(1) and 1202(a)(1).

II.

Petitioner respectfully submits that the question in the case at bar has been decided by this Court in Taylor v. United States, 449 U.S. 895 (1980).

Taylor was convicted in the district court for Section 922(h)(1) receipt and for Section 1202(a)(1) possession of the same firearm. He was sentenced to two years on each. The Third Circuit affirmed by judgment order tabulated at 624 F.2d 1092. Taylor petitioned for certiorari and at that time the Solicitor General confessed error in a memorandum to the Supreme Court taking the position that "receipt and continuous possession thereafter constitutes a single offense for which only a single sentence may be imposed." 635 F.2d at 233.

Acting on the Solicitor General's memorandum, and at his recommendation, this Court vacated the judgment and remanded to the Third Circuit for further consideration "in light of the position presently asserted by the Solicitor General." 449 U.S. at 895.

On remand the Third Circuit in United States v. Taylor, 635 F.2d 232 (3d Cir. 1980) remanded to the district court for resentencing in light of the government's position.

If the concession of the Solicitor General may detract somewhat from the precedential effect of this decision the dissent of two Justices of this Court from the decision is an indication that the decision was far from a mere agreed order even if not binding precedent.

The facts of the case at bar are the same as the facts in Taylor. The statutes are the same even down to the subsection. Petitioner accordingly submits that the results in the two cases should be the same; for in the case at bar the government proved three incidents of the same continuous possession but it never proved a receipt independent from possession.

CONCLUSION

The uniform administration of criminal justice throughout the United States requires that the range of convictions and punishment available to the government, and to which the defendant may be subjected, be the same throughout the Circuits. It is for that principal reason that a writ of certiorari ought to be granted.

Respectfully submitted,

Jo S. Widener

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Counsel of Record

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5253

United States of America, Appellee,

-versus-

Truman Lewis Ball, Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.
Glen M. Williams, District Judge. (CR 83-00044-A)

Argued: March 9, 1984. Decided: MAY 8, 1984

Before RUSSELL and CHAPMAN, Circuit Judges, and FRANK A. KAUFMAN, District Judge for the District of Maryland, sitting by designation.

Jo S. Widener (Widener and Frackelton on brief) for Appellant; Jennie L. Montgomery, Assistant United States Attorney (John P. Alderman, United States Attorney on brief) for Appellee.

Corrected Opinion, Unpublished to Published

RUSSELL: Circuit Judge:

Defendant Truman Lewis Ball was convicted, following a jury trial, of the offenses of receipt of a firearm by a convicted felon, 18 U.S.C. §§ 922(h)(1) and 924(a), and possession of a firearm by a convicted felon, 18 U.S.C. App. § 1202(a)(1). Both offenses involved the same firearm. The District Court sentenced Ball consecutively to three years imprisonment on the receipt offenses, and two years imprisonment on the possession offense suspended to two years probation, denying a motion for change of sentence under Fed.R.Crim.P. 35.[1] Defendant appeals, challenging only the validity of the sentence imposed.

We have jurisdiction to hear the appeal, notwithstanding the pendency of a motion before the District Court for reconsideration of the denial of the Rule 35 motion, since finality attaches with sentencing. Berman v. United States, 302 U.S. 211, 212 (1937). We determined in United States v. Burton, 629 F.2d 975, 978 (4th Cir. 1980), cert. denied, 450 U.S. 968 (1981), that Congress did not intend to authorize cumulative punishment

---

[1] The Rule 35 motion was submitted after the within appeal was noted. Once the appeal was filed, the District Court was without jurisdiction to entertain it. United States v. Johns, 638 F.2d 222, 224 & n.3 (10th Cir. 1981); United States v. Garrett, 583 F.2d 1381, 1391 (5th Cir. 1978); United States v. Mack, 466 F.2d 333 (D.C.Cir.), cert. denied, 409 U.S. 952 (1972).

under 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1202(a) where unlawful possession of the firearm in question is incidental to unlawful receipt of the same gun. The Government concedes on appeal, as it must, that Burton is controlling and that the sentencing scheme of the District Court is illegal. Thus, the only issue before us is one of remedy. The remedy applied in United States v. Wilson, 721 F.2d 967 (4th Cir. 1983) of vacating both sentences and remanding for resentencing is inappropriate here due to the absence of any double jeopardy problem with these statutes, as we determined in Burton, 629 F.2d at 977. Rather, Congress in these firearms statutes created separate offenses, but did not authorize pyramiding penalties. Id. Accordingly, we follow Burton and remand with instructions to modify the sentences so as to make them run concurrently.

REVERSED AND REMANDED WITH INSTRUCTIONS.

United States of America vs.

United States District Court

DEFENDANT: TRUMAN LEWIS A.K.A. General Delivery, Honaker, VA
SSN: 289-72-8222

WEST. DISTRICT OF VA - ABINGDON

DOCKET NO.: 83-00044-A AMENDED

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: 09 DAY: 28 YEA: 83

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jo Widener
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of 18:922(h)(1) & 924(a) 18:1202(a)(1) Receipt of firearm by convicted felon and possessic of firearm by convicted felon.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contr was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendan hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years as to Count 1.

IT IS ADJUDGED that on Count 2 that defendant is hereby committe to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of Two years, however execution of sentence of imprisonment as to Count 2 is suspended and defendant placed on probation for a period of Two years to commence upon defendant's release from confinement as to Count 1.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A TRUE COPY, TESTE:
Joyce F. Hale, Clerk
By: Deputy Clerk

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Glen M. Williams
Date 10-3-83

-110-

13

84-3004

AFFIDAVIT OF SERVICE

I hereby certify that I have served the foregoing petition on the Honorable Rex Lee, Esquire, Solicitor General of the United States by depositing a copy of the same addressed to him at Department of Justice, Washington, D.C., 20530 in the United States Post Office, Bristol, Virginia - Tennessee with first class postage prepaid on the 5th day of July 1984.

Jo S. Widener
Jo S. Widener
Attorney for Petitioner
Counsel of Record

STATE OF VIRGINIA,
CITY OF BRISTOL, to-wit:

Sworn and subscribed to before me this 5th day of July, 1984. In testimony whereof I have hereunto set my hand the day, month and year aforesaid.
Seal

Charles Linnard
Notary Public

My commission expires: September 5, 1987.

-14-

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OPPOSITION BRIEF

ORIGINAL

No. 84-5004

Supreme Court, U.S.
FILED
AUG 9 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-5004

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges his concurrent sentences for his separate convictions in a single prosecution for both receipt and possession of the same firearm.

1. After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of receipt of a firearm by a previously convicted felon, in violation of 18 U.S.C. 922(h)(1), and possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to consecutive terms of imprisonment of three years on the receipt count and two years on the possession count. The district court suspended the sentence on the possession count, however, in favor of two years' probation. The court of appeals reversed and remanded the case to the district court with instructions to modify the sentences so as to make them run concurrently (Pet. App. 10-12).

The evidence at trial showed that in October 1981, the firm of Elliot Brothers of South Carolina shipped a .32 caliber Rossi revolver to McClothlin's Store in Honaker, Virginia (C.A. App. 13-14). On February 22, 1982, McClothlin's store sold the revolver to Hubert Romans (id. at 16). During the summer of 1982, petitioner was a passenger in Romans' car (id. at 19). The next day Romans noticed that the revolver, which had been lying on the back seat of the car, was missing and he reported the incident to the local police (id. at 20).

Later in the summer, Florence Musick notified the police that petitioner pointed a gun, which fit the description of Romans' revolver, at Musick. When petitioner later reappeared at Musick's residence, Musick summoned the police (id. at 30). The police located petitioner as he was leaving the house of Musick's brother. When the police told petitioner that they had a warrant for his arrest, he turned and ran into a bedroom. Romans' gun was subsequently found in the bedroom (id. at 40, 41, 46).

2. On appeal, petitioner challenged the validity of the consecutive sentences imposed by the district court. The government conceded that under the Fourth Circuit's previous decision in United States v. Burton, 629 F.2d 975 (1980), cert. denied, 450 U.S. 968 (1981), consecutive sentences could not be imposed for unlawfully receiving and unlawfully possessing the same firearm, where unlawful possession of the firearm was incidental to its unlawful receipt. Relying upon Burton, the court of appeals remanded the case to the district court with instructions to modify the sentences so as to make them run concurrently (Pet. App. 12).

3. Petitioner contends (Pet. 6-7) that the court of appeals should have vacated the conviction and sentence on one of the firearm counts instead of ordering that the sentences be made to run concurrently. Petitioner correctly notes that some courts have held that where a defendant is convicted both of receiving or transporting and possessing the same firearm, one of his convictions must be vacated. See United States v. Wigs, 662 F.2d 1325, 1334-1336 (9th Cir. 1980) (18 U.S.C. 922(g)(1) and 18 U.S.C. App. 1202(a)(1); United States v. Larson, 625 F.2d 67 (5th Cir. 1980) (18 U.S.C. 922(h)(1) and 18 U.S.C. App. 1202(a)(1)); United States v. Girst, 636 F.2d 316, 319-321 (D.C. Cir. 1979) (18 U.S.C. 922(g)(1) and 18 U.S.C. App. 1202(a)(1)). Nevertheless, we do not believe that the difference between those cases and the instant one warrants review by this Court.

Whether petitioner is entitled to have one of his concurrent sentences and convictions vacated is a question of no practical import. The two gun control provisions in question overlap, but are not coterminous. See United States v. Batchelder, 442 U.S. 114, 118-119 (1979). Because a jury could therefore convict a defendant under one statute and not the other in a particular case, the government should unquestionably be entitled to prosecute a defendant under both statutes as an initial matter. See id. at 119, 122; United States v. Laranga, 614 F.2d 239 (10th Cir. 1980). Cf. Simpson v. United States, 435 U.S. 6, 16 (1978); Grimes v. United States, 607 F.2d 6, 15 n.8 (2d Cir. 1979).

Petitioner does not assert, and indeed he could not, that his convictions under Section 922(h)(1) and 1202(a)(1) will have adverse collateral consequences that would, in effect, result in cumulative punishment. The Parole Commission advises us that petitioner's eligibility for parole will not be affected by the multiple convictions, because only a single weapon was involved and its unlawful possession was incidental to its unlawful receipt. And while the Commission will consider petitioner's

prior criminal record in determining his parole eligibility with respect to any sentence he might someday receive for future criminal misconduct (see 28 C.F.R. 2.20), multiple convictions arising out of a single indictment and adjudication, such as petitioner's here, constitute a single conviction for such purposes. See Parole Commission Rules and Procedure Manual, § 2.20-07, ¶ A.1, p.61 (Oct. 1, 1983). Nor will petitioner be any more stigmatized by his separate firearms convictions than he would have been by a single such conviction, since both convictions arose out of the same criminal conduct proven at a single criminal trial. 1/

The "concurrent sentence" doctrine supports the conclusion that no substantial interest of petitioner's is infringed by his convictions under both Sections 922(h)(1) and 1202(a)(1). Under that doctrine, courts have authority to decline to review a defendant's challenge to counts for which he received a sentence that is concurrent to the sentence on other valid counts. See Andresen v. Maryland, 427 U.S. 463, 469 n.4 (1976); Barnes v. United States, 412 U.S. 837, 848 n.16 (1973). That, of course, is precisely the situation here. The fact that the basis for petitioner's challenge is the validity of the concurrent sentences themselves renders the doctrine no less applicable. Therefore, absent any claim by petitioner that he has been

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1/ Any other conceivable adverse collateral consequences would be speculative and can be considered "when they surface and are sought to be applied in a concrete situation." United States v. Johnson, 709 F.2d 639, 642 (11th Cir. 1983), cert. denied, No. 83-5413 (Dec. 5, 1983).

prejudiced by the concurrent sentence, there is no substantial issue warranting further review by this Court. 2/

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1984

2/ Petitioner's reliance on Taylor v. United States, 449 U.S. 895 (1980), is misplaced. There, Taylor received consecutive sentences for violating Sections 922(h)(1) and 1202(a)(1). The government conceded before this Court that Congress did not intend to permit consecutive sentences where a person unlawfully receives a firearm and thereafter continuously possesses the same firearm until the time of his arrest (80-5187 U.S. Memo. 2-3), and it asked that the case be remanded for further proceedings "in light of the position we have taken herein" (id. at 3). This Court then remanded to the court of appeals for further consideration "in light of the position presently asserted by the Solicitor General." 449 U.S. at 895. Neither this Court nor the government ever suggested that it would have been improper if Taylor had received concurrent sentences for his firearms violations.

REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

MEMORANDUM FOR TRUMAN LEWIS BALL IN REPLY

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TABLE OF CITATIONS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR TRUMAN LEWIS BALL IN REPLY

The government in its memorandum in opposition to Ball's petition for writ of certiorari, acknowledges that the circuits are in conflict over whether one of a defendant's convictions must be vacated where, for a single continuous possession of only one firearm, he has been convicted under both 18 U.S.C. Section 922(h)(1), receipt of a firearm by a convicted felon, and 18 U.S.C. Section 1202(a)(1), possession of the same firearm.

The government, nevertheless, contends that the writ should not be granted because of the concurrent sentence doctrine, which is, that

> . . if a defendant is given concurrent sentences on several counts, and the conviction on one count is good, an appellate court need not consider the validity of the conviction on the other counts. 3 Wright, Fed. Pract. & Proc., Criminal, Section 527 (1982).

For authority that this rule applies here, the government cites Andresen v. Maryland, 427 U.S. 463, 469 n.4 (1976) and Barnes v. United States, 412 U.S. 837, 848 n.16

(1973). In Andresen, the Court recognized the concurrent sentence doctrine but rejected its application and reached the merits of petitioner's search and seizure claims as to some of his concurrent sentences in spite of the two other admittedly valid counts.

In Barnes, the Court decided two counts were valid in spite of petitioner's claim that a jury instruction violated due process. Then, under the concurrent sentence doctrine, the Court refused to examine the validity of the other counts.

The government does not cite Benton v. Maryland, 395 U.S. 784 (1969), the recent leading case on the concurrent sentence rule and the case in which the Court held the double jeopardy clause of the U.S. Constitution applies to the states through the Fourteenth Amendment.

In arguing that the concurrent sentence doctrine should apply here, the government asserts that the only conceivable adverse legal consequence to Ball of having two convictions for a single act is if two convictions cause Ball's parole eligibility date to be later than it would be if he had only one conviction. The government claims his parole elibibility date will not be affected. But even if it is not, this position taken by the government contradicts the Court's reasoning in Benton. It is an "obvious fact of life," the Court said, "that most criminal convictions do in fact entail adverse collateral legal consequences." 395 U.S. at 790.

The two examples of adverse consequences given in Benton apply here:

1. A few states consider all prior felony convictions to ennance sentences under habitual criminal statues, even if the convictions are only separate counts in a single indictment tried on the same day. Petitioner might some day in one of these states have both his convictions counted against him.

2. Both petitioner's convictions might some day be used to impeach his character if put in issue at a future trial. Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this sublety. 395 U.S. 790-791.

In two out of the last three cases in which the Court considered whether or not to apply the doctrine, that is, in both Benton and Andresen, the Court in its discretion, refused to apply the concurrent sentence doctrine and instead, reached the merits on other counts even though a valid count existed.

In the only case where the question involved a double jeopardy claim, that is, in Benton, the Court refused to apply the concurrent sentence doctrine, but instead, exercised its discretion in favor of reacning the merits of the claim on other counts even though a valid count existed. Petitioner submits, the same result should be reached here, and the Court should exercise its discretion in a like manner for a like question.

Finally, the government argues, that "any other conceivable adverse collateral consequences would be speculative and can be considered 'when they surface and are sought to be applied in a concrete situation.'"

But in Sibron v. New York, 392 U.S. 40, 56-57 (1967), where the question was whether an appeal was moot after the defendant had been released from confinement, the Court said:

> the sooner [the validity of a criminal conviction] is fully litigated the better for all concerned. . . . [L]itigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die or memories fade. And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for

> an indefinite period of time before he can secure adjudication of the state's right to impose it on the basis of some past action.

The real significance of Sibron here is that the Court said its refusal to apply the concurrent sentence doctrine in Benton was in part based upon the same considerations outlined in Sibron.

In all events, there is considerable controversy over the concurrent sentence doctrine. Professor Wright, Section 527 at 123, describes the subject as in ferment. That being true, petitioner suggests that, far from being a reason to deny certiorari with the resulting enigmatic affirmance, the sought for application of the rule is instead, an additional reason to grant the writ.

Respectfully submitted,

Jo S. Widener

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August 1984

PETITIONER'S

BRIEF

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No. 84-5004 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRUMAN LEWIS BALL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF PETITIONERS

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QUESTION PRESENTED

Is the United States permitted to convict and sentence a convicted felon under both 18 U.S.C. Sections 922(h) (1) and 1202(a) (1) where the unlawful receipt of the firearm under Section 922(h) (1) was incidental to unlawful possession of the same gun?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The case is reported below as *United States* v. *Ball*, 734F.2d 965 (4th Cir. 1984).

The case was tried to a jury and there is no official or unofficial report or opinion of the case in the district court.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The decision of the Court of Appeals here reviewed is dated May 8, 1984. The petition for a writ of certiorari was filed with the Clerk of this Court within 60 days after May 8, 1984 as required by Rule 20.1 of this court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

18 U.S.C. Section 922 (h) (1)

It shall be unlawful for any person (1) . . . who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm . . . which has been shipped or transported in interstate . . . commerce.

18 U.S.C. Section 924(a):

Whoever violates any provision of this chapter [which includes Section 922 (h) (1)] . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both . . .

18 U.S.C. App. Section 1202 (a) (1):

Any person who (1) has been convicted by a court . . . of a State . . . of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

One day in the summer of 1982, Petitioner Ball, a convicted felon, was among the passengers in Hubert Roman's automobile, on the back seat of which was a nickel plated Rossi revolver. (JA 9) Romans purchased the gun from a licensed dealer in Honaker, Virginia, but it had previously come from South Carolina. The day after the auto ride, Romans reported the gun missing to the Sheriff's office. (JA 9)

The United States proved at Ball's trial that he had possession of the revolver on three occasions: when he found the gun in a bag of beer (JA 24, 25); when he pointed it at Clarence Musick (JA 14, 15); and when deputy sheriffs arrested him at Gary Musick's house and saw the gun in his back pocket. (JA 23)

The record does not show the date when Ball found the gun in the bag of beer, but the other two incidents of possession occurred on June 11, 1982. (JA 32)

Pursuant to jurisdiction under 18 U.S.C. Section 3231, Ball was tried and convicted on September 28, 1983, by a jury under a two count indictment for violating 18 U.S.C. Section 922 (h) (1), receipt by a convicted felon of a firearm shipped in interstate commerce, and 18 U.S.C. App. Section 1202 (a) (1), possession by a convicted felon of a firearm in commerce and affecting commerce.

The judgment and conviction order dated October 3, 1983 sentenced Ball to three years imprisonment for receipt under Section 922 (h) (1) and to two years imprisonment for possession under Section 1202 (a) (1). The two year sentence was suspended in favor of two years probation "to commence upon defendant's release from confinement as to Count 1." Thus the sentences were consecutive.

Ball filed an F.R.Crim.P. 35 motion in the district court challenging his sentences as illegal. The motion was denied by the District Court.

Ball appealed to the United States Court of Appeals for the Fourth Circuit requesting that one of his convictions and its corresponding sentence be vacated, contending that conviction under both statutes for the same act violated the intent of Congress in passing these statutes, and the double jeopardy clause. The Court of Appeals, in *United States* v. *Ball*, 734 F.2d 965 (4th Cir. 1984) refused to vacate one of the convictions, but instead, following its own precedent in *United States* v. *Burton*, 629 F. 2d 975 (4th Cir. 1980), reversed and remanded with instructions to modify the sentences so as to make them run concurrently.

SUMMARY OF ARGUMENT

I.

The decisions of the Courts of Appeal are in conflict on the precise point at issue here. The majority view is the view which should apply to Petitioner.

II.

To allow both Petitioner's two convictions to stand when Congress has not authorized the pyramiding of

penalties under Sections 922 (h) (1) and 1202 (a) (1) would be to violate the double jeopardy clause.

III.

This Court has decided the question presented here in the summary disposition of *Taylor* v. *United States*, 449 U.S. 895 (1980).

ARGUMENT

I.

THE DECISIONS OF THE COURTS OF APPEALS ARE IN CONFLICT ON THE PRECISE POINT AT ISSUE HERE. THE MAJORITY VIEW IS THE RULE WHICH SHOULD APPLY TO PETITIONER.

Whether or not the United States is permitted to convict and sentence a felon under both Section 922 (h) (1) and Section 1202 (a) (1) where the unlawful receipt of the firearm was incidental to unlawful possession of the same gun is the question upon which Petitioner's case turns. On this question the Courts of Appeals have rendered conflicting decisions.

In general terms, this conflict has produced three lines of cases. In one, the Circuits view receipt and possession as offenses involving essentially the same elements. Simply stated, it is impossible for one to possess a gun unless he has first received it. *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984). Convictions for a single act under both Section 922 (h) (1) and Section 1202 (a) (1) cannot stand, e.g., *United States* v. *Conn*, 716 F.2d 550 (9th Cir. 1983).

The Tenth Circuit, however, views possession and receipt as separate and distinct acts, and holds that Sections 922 (h) (1) and 1202 (a) (1) proscribe different acts, each of which is available for separate conviction and punishment. *United States* v. *Larranaga*, 614 F.2d 239, 241 (10th Cir. 1980).

The third view, represented by *United States* v. *Burton*, 629 F.2d 975 (4th Cir. 1980), the precedent under which petitioner stands convicted of both offenses, reasons that "proscription of receipt is a proscription of possession." 629 F.2d at 977. But rather than to vacate one of the convictions, the Fourth Circuit's procedure is to make the sentences run concurrently.

Petitioner respectfully urges the Court to adopt the first stated line of cases and argues that these are the better reasoned.

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is, whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932).

But before making this examination, in order to avoid constitutional decisions where possible, it is necessary to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged. *Simpson* v. *United States*, 435 U.S. 6, 12 (1978), *citing*, *Jeffers* v. *United States*, 432 U.S. 137, 155 (1977).

The Supreme Court discussed the Congressional intent behind Sections 922 (h) (1) and 1202 (a) (1) in *United States* v. *Batchelder*, 442 U.S. 114 (1978), albeit in a slightly different context. The Court's conclusions are instructive as to the present issue, nonetheless.

In *Batchelder*, the Court said Congress, in adding the Section 1202 (Title VII) amendment, had not intended to pre-empt Section 922's more stringent penalty provisions

(found in Section 924) in cases where the two statutes overlap. This was obvious to the Court because the legislative history showed the purpose of Section 1202 (Title VII) was not to take from, but to complement, Section 922 (Title IV).

A reading of the two statutes makes clear what this complement is to be. First, although subsections of the two Titles do address their prohibitions to some of the same people, each statute also reaches substantial groups of people not reached by the other. Section 922 reaches persons who are under indictment for a felony, who are fugitives from justice and who are unlawful drug users. Section 1202 reaches persons who have been discharged from the service under dishonorable conditions, who have renounced their citizenship and who are illegal aliens. But both sections reach convicted felons and adjudicated mental incompetents. And in those cases, the statutes are not complementary, they are identical.

Second, Title VII complements Title IV by punishing a broader class of behavior. For example, a felon receiving a firearm prior to the effective date of the statute, could not be convicted under Section 922 (h) (1) for receipt, but could be convicted under Section 1202 (a) (1) for possession. *Scarborough* v. *United States*, 431 U.S. 563 (1976); see, *United States* v. *Bass*, 404 U.S. 336, 342 (1971).

In light of their complementary roles, the Court in *Batchelder* rejected defendant's claim that Section 1202 impliedly repealed Section 922, and concluded, instead, that Congress had intended to enact two independent gun control statutes, each fully enforceable on its own terms. *Batchelder*, at 119. The different penalty provisions could coexist because they applied to convictions under different statutes. *Batchelder*, at 113.

The Court was nevertheless mindful that the same conduct, as in *Batchelder* itself, could violate both statutes. That Section 1202 (a) provides different penalties for essentially the same conduct is no justification for taking liberties with unequivocal statutory language. 422 U.S. at 121-2. That this particular conduct may violate both Titles does not detract from the notice afforded by each. 442 U.S. at 123. Thus, even though the Court recognized that Sections 922 and 1202 provide different penalties for essentially the same conduct, 442 U.S. at 121, the Court found no constitutional infirmities, for "*when an act violates more than one criminal statute, the Government may prosecute under either* so long as it does not discriminate against any class of defendants." *Batchelder*, at 123. (Emphasis added)

The offense in *Batchelder* is indistinguishable from the offense in the present case. Batchelder, a convicted felon, purchased a .38 caliber revolver from an undercover agent of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms while he was tending bar in Bellevue, Illinois. At the moment when he reached across the bar and took possession of the revolver, he was guilty of Section 922 receipt and Section 1202 possession. So also, when Truman Ball reached into the bag of beer and picked up the revolver, he, too was guilty of both offenses. The single act in each case violated both statutes.

But *Batchelder* concerned indictment under 922 (h) (1), and the Court stopped short of saying explicitly that the government could not prosecute under both statutes. Petitioner, however, stands convicted under both Sections 922 (h) (1) and 1202 (a) (1) and, unlike in *Batchelder*, that issue is now properly before the Court.

In *United States* v. *Girst*, 645 F.2d 1014 (D.C. Cir. 1979), the question was whether the government could

prosecute under both Section 922 (g) (1)* transportation of a firearm and Section 1202 (a) (1) possession. On the first appeal, 636 F.2d 316 (D.C. Cir. 1979) the court had held that the two statutes proscribed substantially the same single offense and, applying the rule of lenity had vacated the Section 922 conviction. On rehearing, the court held that *Batchelder* prohibited the application of the rule of lenity, but then went on to say that "since *Batchelder* further states that the Government may prosecute under "either" section 922 or section 1202, that indicates that convictions under *both* sentences cannot stand. Thus one of the convictions under Section 924 or Section 1202 must be vacated." The same results have obtained for Sections 922 (g) (1) and 1202 (a) (1) in *United States* v. *Wiga*, 662 F.2d 1325 (9th Cir. 1981) and in *United States* v. *Ivy*, 644 F.2d 479 (5th Cir. 1981). Both cases, relying on *Batchelder* and *Girst* hold that the government may proceed under either statute, but not both.

United States v. *Larson*, 625 F.2d 67, 69 (5th Cir. 1980), involved the same two statutes as the case at bar, that is, Sections 922 (h) (1) and 1202 (a) (1). The court, relying on *Batchelder* and *Girst*, held that the government "may not proceed under both statutes" and remanded to the district court to vacate one conviction.

In *United States* v. *Conn*, 716 F.2d 550, 552 (9th Cir. 1983) the Ninth Circuit, relying on *Wiga*, held "a defendant may not be charged with both receipt [922 (h) (1)] and possession [1202 (a) (1)] of the same weapon." Even

*922 (g) (1) is identical to 922 (h) (1), except the words "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," are replaced with the words "to ship or transport any firearm or ammunition in interstate or foreign commerce" in (g) (1).

though Conn's sentences were to run concurrently, the court declined to invoke the concurrent sentence doctrine and reversed.

In *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984) the court remanded with directions to vacate one of defendant's two convictions under Sections 922 (h) (1) and 1202 (a) (1). The court, relying on *Conn*, *Girst*, *and Larson*, *supra*, held:

> We do not agree that possession is a lesser included offense of receipt; rather the offenses are the same. "Receipt" under Section 922 (h) has been defined broadly as "any knowing acceptance or taking of possession." See United States v. Griffin, 705 F.2d 434, 437 (11th Cir. 1983). Accordingly, one cannot possess a firearm without receiving it. And when received, a firearm is necessarily possessed. at 592.

The survey of this line of cases represents the views of the Fifth, Seventh, Ninth and D.C. Circuits. Only the Tenth Circuit, to our knowledge takes the opposite view.

In *United States* v. *Larranaga*, 614 F.2d 239 (10th Cir. 1979), the Tenth Circuit relied on the statement in *Batchelder* that Sections 922 (h) (1) and 1202 (a) (1) were independent, each enforceable on its own terms. The court also relied on *United States* v. *Fikes*, 373 F. Supp. 1052 (E. D.Mich. 1974), aff'd without published opinion, 510 F.2d 973 (6th Cir. 1975), for the proposition that receipt and possession are not synonymous.

In *Fikes* however, the defendant was indicted only under Section 922 (h) (1) for receipt. The government proved Fikes had possession of the gun, but could not prove the exact date of the receipt. The question was whether proof of possession was enough to sustain the conviction under Section 922 (h) (1). The *Fikes* court held that proof of the precise, as contrasted to an approximate,

time of receipt was not critical to defendant's guilt and denied his motion for acquittal.

As to whether the two were synonymous the court actually said the following:

> It is not necessary to dispute whether "receiving" and "possessing" are synonymous or not. Referring again to United States v. Brown [472 F.2d 640 CA6 1956] the Sixth Circuit has stated:
>
> ". . . as we pointed out in United States v. McCreary, 455 F.2d 647 (CA6 1972), one could not very well possess a firearm without receiving it." Id at 1182.

Larranaga, nevertheless, held that the defendant could be convicted under both Section 922 (h) (1) and Section 1202 (a) (1) without violating the double jeopardy clause.

United States v. *Burton*, 629 F.2d 975 (4th Cir. 1980), which represents the third view, and the precedent under which Petitioner stands convicted, will be fully discussed in the section to follow.

II.

TO ALLOW BOTH PETITIONER'S CONVICTIONS TO STAND WHEN CONGRESS HAS NOT AUTHORIZED THE PYRAMIDING OF PENALTIES UNDER 18 U.S.C. SECTIONS 922 (h) (1) AND APP. 1202 (a) (1) IS TO VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The power to define criminal offenses and to prescribe the punishments for convictions of such offenses resides wholly with the Congress. *Whalen* v. *United States*, 445 U.S. 684, 689 (1979).

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or

only one, is whether each provision requires proof of a fact which the other does not. *Blockburger* v. *United States*, 284 U.S. 299 (1932).

The assumption underlying the *Blockburger* rule of statutory construction is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense" they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. *Whalen*, at 692.

At petitioner's trial the government proved three incidents of Petitioner's possession of the Rossi revolver: when he found the gun in the bag of beer; when he waved it at Clarence Musick; and when deputy sheriffs arrested him in Gary Musick's house. But the government never proved receipt separate from his possession. Therefore, under *Blockburger*, there is only one offense. Logic dictates that one who possesses a gun, has necessarily received it. *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984); *United States* v. *Burton*, 629 F.2d 975 (4th Cir. 1980); *United States* v. *McCreary*, 455 F.2d 647 (6th Cir. 1972).

When Petitioner reached in the bag of beer and took possession of the gun, he was guilty of both offenses, and this single act was the proof of both.

In *Blockburger* v. *United States*, 284 U.S. 299, 303 (1931), the Court quoted Wharton's Criminal Law, 11th ed., Section 34, to illustrate an act continuous in nature.

> ". . . when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.

In *Blockburger*, separate indictments could lie for there were two drug sales. The first sale resulting from the first impulse, came to an end. The second sale was not the result of the first original impulse, but of a fresh one. But Petitioner's possession of the revolver, even though observed on three separate occasions, was still the result of one original impulse, i.e., when Ball reached into the bag of beer and took possession of that gun.

Although noting that Congress did not authorize pyramiding penalties for Sections 922 (h) (1) and 1202 (a) (1), the Fourth Circuit Court of Appeals did not vacate one of Petitioner's two convictions because the court found "an absence of any double jeopardy problem with these statutes." Citing *United States* v. *Burton*, 629 F.2d 975, 977 (4th Cir. 1980).

Burton's case was before the Fourth Circuit on appeal of denial of a Rule 35 motion. He had previously filed a direct appeal challenging that his two convictions, one for receipt and one for possession of the same firearm, violated his right against double jeopardy. A screening panel found no merit to his claim in an unpublished opinion. On appeal from denial of his Rule 35 motion, however, he phrased his challenge in terms of statutory construction. The Court found Sections 922 (h) (1) and 1202 (a) (1) "are in the main duplicative in their reach of a class of felons, and Burton is indisputably within the definition of each statute." 629 F.2d at 977.

The court held that where "unlawful possession of a firearm in violation of Section 1202 (a) is incidental to his unlawful receipt of the same gun in violation of Section 922 (h) (1), cumulative punishment is not authorized," and reversed and remanded with instructions to make the sentences run concurrently.

Petitioner respectfully submits that the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. *Brown* v. *Ohio*, 432 U.S. 161, 165 (1976). It is not a tool used by the Courts to strike down statutes as unconstitutional in the sense that the due process or equal protection clauses are so used. This is because the power to define criminal offenses and to proscribe punishments resides wholly with legislatures. *Whalen* v. *United States*, 445 U.S. 684, 689 (1979). The inquiry then is whether *courts* have imposed multiple punishments which are not authorized by the legislature. *Brown* v. *Ohio*, 432 U.S. 161, 165 (1976).

For the Court of Appeals to refuse to vacate one of Petitioner's convictions "due to the absence of any double jeopardy problem with these statutes" we submit is error.

Blockburger is the law of the land and has been for fifty years. Under *Blockburger*, courts cannot impose multiple punishments for a single act or course of conduct unless each statutory provision requires proof of a fact which the other does not.

In Petitioner's case mere proof of possession will satisfy the statutory requirements for both offenses, *Batchelder* at 116, 121, 122, 123. Therefore, under *Blockburger* there is only one offense for which conviction and sentence will lie.

III.

THE COURT HAS DECIDED THE QUESTION PRESENTED HERE IN THE SUMMARY DISPOSITION OF *TAYLOR* v. *UNITED STATES*, 449 U.S. 895 (1980).

Petitioner respectfully submits that the question in the case at bar has been decided by this Court in *Taylor* v. *United States*, 449 U.S. 895 (1980).

Taylor was convicted in the district court for Section 922 (h) (1) receipt and for Section 1202 (a) (1) possession of the same firearm. He was sentenced to two years on each. The Third Circuit affirmed by judgment order tabulated at 624 F.2d 1092. Taylor petitioned for certiorari and at that time the Solicitor General confessed error in a memorandum to the Supreme Court taking the position that "receipt and continuous possession thereafter constitutes a single offense for which only a single sentence may be imposed." 635 F.2d at 233.

Acting on the Solicitor General's memorandum, and at his recommendation, this Court vacated the judgment and remanded to the Third Circuit for further consideration "in light of the position presently asserted by the Solicitor General." 449 U.S. at 895.

On remand the Third Circuit in *United States* v. *Taylor*, 635 F.2d 232 (3d Cir. 1980) remanded to the district court for resentencing in light of the government's position.

If the concession of the Solicitor General may detract somewhat from the precedential effect of this decision the dissent of two Justices of this Court from the decision is an indication that the decision was far from a mere agreed order even if not binding precedent.

The facts of the case at bar are the same as the facts in *Taylor*. The statutes are the same even down to the subsection. Petitioner accordingly submits that the results in the two cases should be the same: for in the case at bar the government proved three incidents of the same continuous possession but it never proved a receipt independent from possession.

CONCLUSION

The uniform administration of criminal justice throughout the United States requires that the range of convictions and punishment available to the government, and to which a defendant may be subjected, be the same throughout the Circuits.

Blockburger and Batchelder require that the case be remanded to the district court with instructions to vacate one of the convictions.

Respectfully submitted,

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JOINT

APPENDIX

Office - Supreme Court, U.S
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No. 84-5004

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 5, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

42 pp

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In the United States District Court for the Western District of Virginia

May, 1983, Session Thereof at Roanoke

Criminal No. 8344

UNITED STATES OF AMERICA

v.

TRUMAN LEWIS BALL

COUNT ONE

The Grand Jury charges:

1. That between on or about June 1, 1982, and on or about June 11, 1982, the precise date being unknown to the Grand Jury, in the Western Judicial District of Virginia, TRUMAN LEWIS BALL, having been convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly received a firearm, that is, a Rossi, .32 caliber revolver, S/N C 234558, which had been shipped and transported in interstate commerce.

2. All in violation of Title 18, United States Code, Sections 922(h)(1) and 924(a).

COUNT TWO

The Grand Jury charges:

1. That on or about June 11, 1982, in the Western Judicial District of Virginia, TRUMAN LEWIS BALL, having been convicted of a felony, knowingly possessed in commerce and affecting commerce a firearm, that is, a Rossi, .32 caliber revolver, S/N C 234558.

2. All in violation of Title 18, United States Code (App.), Section 1202(a)(1).

A True Bill, May 10, 1983.

JAMES R. WALPOLE,
Foreman.

JOHN P. ALDERMAN,
United States Attorney.

In the United States District Court for the Western District of Virginia

Abingdon Division

Criminal Action No. 83-00044(A)

Abingdon, Virginia, September 28, 1983, 9:55 o'clock, a.m.

UNITED STATES OF AMERICA

v.

TRUMAN LEWIS BALL, DEFENDANT

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE GLEN M. WILLIAMS, and a jury.

TRANSCRIPT ORDERED BY: JO WIDENER, ESQ. (WIDENER & FRACKELTON).

APPEARANCES:

For the Government: United States Attorney for the Western District of Virginia. By: Thomas J. Bondurant, Esq., P.O. Box 1709, Roanoke, Virginia 24008.

For the Defendant: Widener & Frackelton, By: Jo Widener, Esq. and David Frackelton, Esq., P.O. Box 357, Bristol, Virginia 24203.

Court Reporter: Robert C. Haumesser, Official Court Reporter, Western District of Virginia, P.O. Box 924, Abingdon, Virginia 24210.

(Proceedings begun at 9:55 o'clock a.m.)

(The case was called.)

(A twelve member jury and two alternates was duly impaneled and sworn.)

(Mr. Bondurant requested separation of witnesses.)

(The jury was taken to its room.)

(Out of the presence of the jury.)

The COURT. All right, the record will show that prior to the commencement of the trial, and prior to the convening of Court, the Court heard counsel in chambers, at which time the defendant moved the Court to exclude from each of the counts in the indictment, the nature of the crime of which Mr. Ball was convicted. In Count One,

the words "having been convicted of threat to bomb a dwelling house" is stricken by the Court, so that it merely reads that Truman Lewis Ball was—"having been convicted of a crime punishable by imprisonment for a term exceeding one year". Likewise, in Count Two, the words "convicted of a threat to bomb a dwelling house" is stricken out, and instead it will simply read, "convicted of a felony". The Government, by counsel, excepting to the ruling of the Court. I believe this was all the pretrial matters, except for the stipulation. And, as I understand it, the Court will inform the jury at the outset of the trial, that it is stipulated that Mr. Ball has been—was convicted of a felony in the year 1973, is that correct?

Mr. BONDURANT. Yes, sir. And, of course, we object to that. I want to make it clear that the Government does object to that stipulation.

The COURT. You're objecting to the stipulation, also.

Mr. BONDURANT. Yes, sir. I feel we should prove this. I do understand there is a Fourth Circuit case that pretty much sets forth, but all the other Circuits in the country allows the Government to reject the stipulation. So, I reckon I best——

The COURT. Very well. All right. It's noted, that while you're willing to stipulate, you're objecting to it being handled in that manner, and prefer to put on evidence.

Mr. BONDURANT. Well, no. We do not stipulate at all. I believe the Fourth Circuit case makes the Government stipulate, it's a kind of forced stipulation, and we object to being forced.

The COURT. All right, you're being forced by the Court to stipulate to it, then.

Mr. BONDURANT. Yes, sir.

The COURT. All right.

Mr. BONDURANT. It's kind of interesting how it's written, but I didn't write it.

The COURT. Well, we'll take a short recess, then, and be ready to begin the evidence when we return.

(Recess from 10:51 o'clock a.m. to 11:31 o'clock a.m.)

GOVERNMENT'S EVIDENCE

JENNINGS SHEALY, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Sir, state your name and where you live.
A. Jennings Shealy, Chapin, South Carolina.
Q. Sir, by whon are you employed?
A. Eliott Brothers.
Q. Sir, and does your firm distribute guns to gun dealers?
A. Yes, sir.
Q. What is your position with Eliott Brothers?
A. I'm in charge of inventory.
Q. Sir, and being in charge of inventory, do you have control and access of the business gun records?
A. That's correct.
Q. Sir, did your firm ever ship a Rossi thirty-two caliber revolver, nickel finished, serial number C234558?
A. Yes, sir.
Q. Who was that shipped to, that gun?
A. McGlothlin's Store, Route 2, Box 332, Honaker, Virginia, on 10/7/81.
Q. So, it was shipped in October of——
A. Of '81.
Q. October 8th, '81?
A. It was sent in '81.
Q. To Honaker, Virginia?
A. Yes, sir, to McGlothlin's Store.
Q. And, it was shipped from South Carolina?
A. From South Carolina.
Mr. BONDURANT. Thank you, sir.
The COURT. Cross examine?
Mrs. WIDENER. No questions.
The COURT. All right, may this witness be excused on both sides?
Mr. BONDURANT. Yes, sir.
The COURT. You're excused. Call your next witness.

Mr. BONDURANT. I call Mr. Marvin C. McGlothlin.

MARVIN C. MCGLOTHLIN, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay sir, would you please state your name for the jury?
A. Marvin Clarence McGlothlin.
Q. Where do you live, Mr. McGlothlin?
A. Over at Honaker, Virginia.
Q. Do you have a firearms license, a federal firearms license?
A. Yes, sir.
Q. Sir, having a federal firearms license, do you maintain books on the guns you receive, and the guns you sell?
A. Yes, sir.
Q. What's that book called?
A. The book?
Q. Yes.
A. It's the Disposition Record.
Q. Okay. Did you have the occasion to receive a Rossi thirty-two caliber revolver, nickel finish, serial number C234558?
A. Yes, sir. I received it on the 10th and 9th of '81.
Q. The 10th and 9th of what month?
A. That would be October or November.
Q. Well, is it October the 10th sir, or ——
A. It's 10th/9th, November, whatever.
Q. Oh, 10th and 9th, I'm sorry, of October?
A. Yes.
Q. And, who did you receive that gun from?
A. Eliott Brothers in South Carolina, Chapin, South Carolina.
Q. Okay, sir. Now, did that gun have pearl handles on it?
A. I put the pearl handles on it before I sold it.
Q. Real pearl or fake pearl?

A. No, it's fake pearl.

Q. Okay, and why did you put pearl handles on it?

A. Well, it helped the sale. Usually these guns with the wooden handles, and some with the pearl, one customer'll take one, and one another.

Q. Okay, sir. And, did the gun have a blue tint finish, a nickel finish?

A. Nickel finish.

Q. Okay sir, did you later sell that gun to somebody?

A. I sold it to Hubert Romans on the 2nd and 22nd of '82. That would have been February 22nd.

Q. Okay, sir. I show you this document, Firearms Transaction Corrected Form forty-four, seventy-three. Would you please identify that?

A. That's the form that I filled out to Hubert Romans. He signed it right there.

Q. Okay, so that's the gun you sold to him?

A. That's right.

Q. And, what kind of gun was that, sir?

A. A Rossi, R-O-S-S-I, Rossi, thirty-two caliber, nickel plate with the pearl handles.

Q. What was the serial number on it?

A. C234558.

Q. Sir, where is that gun made?

A. It's made in Brazil.

Mr. BONDURANT. Okay. Your Honor, I move to introduce this Form forty-four, seventy-three, as Government's Exhibit #1.

The COURT. It will be introduced as GOVERNMENT'S EXHIBIT #1.

By Mr. BONDURANT (continues examination).

Q. Okay, sir. When you got the gun, was it brand-new?

A. Yes, sir.

Mr. BONDURANT. Thank you.

The COURT. Cross examine.

Mrs. WIDENER. We have nothing.

The COURT. All right, may this witness be excused by both sides?

Mr. BONDURANT. Uh, hold it a second, please. (Conferring with Case Agent.) Yes, sir, he can be excused.

The COURT. Call your next witness.

Mr. BONDURANT. Mr. Hubert Romans.

HUBERT ROMANS, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay sir, would you please state your name for the jury?

A. Hubert Romans.

Q. Sir, do you know the defendant here, Truman Lewis Ball?

A. Yeah.

Q. About how long have you known him?

A. Oh, about four or five years, I guess.

Q. Okay, did you ever own a Rossi thirty-two caliber pistol?

A. Yeah.

Q. Who did you buy it off of?

A. Herbert McGlothlin.

Q. Is he also called Marvin Clarence McGlothlin?

A. Yes.

Q. Who lives over in Honaker, Virginia?

A. Yeah.

Q. Was the gun blue tint or nickel plated?

A. Nickel.

Q. Did it have pearl handles on it?

A. Yes, sir.

Q. Mr. Romans, I show you what has been marked at Government Exhibit #1. Is this the form you filled out when you bought that gun?

A. Show me that.

Q. That is your signature there?

A. Yeah.

Mr. BONDURANT. Your Honor, do you mind if I pass this around to the jury? (Passing Exhibit to jury.)

By Mr. BONDURANT (continues examination).

Q. Sir, what became of that gun?
A. The Rossi?
Q. Yeah.
A. Thirty-two?
Q. Yes, what became of it?
A. Oh, I don't know. I just sold it.
Q. Well, did there come a time when someone stole the gun off of you?
A. Huh?
Q. Did someone steal the gun off of you?
A. Yeah, somebody did.
Mrs. WIDENER. Objection, leading.
The WITNESS. But, I took it to the flea market and sold it.
The COURT. Just a minute. Don't lead the witness, rephrase it.

By Mr. BONDURANT (continues examination).

Q. Did there come a time when you lost the gun, and lost control of the gun?
A. Lost control of it?
Q. Did someone steal the gun from you or not?
A. Yes, somebody stole it.
Q. Okay, when did that happen?
A. Last summer sometime.
Q. Would it be last summer, 1982?
A. Something like that.
Q. Okay. When was the gun stolen from your car?
A. Last summer sometime. I don't know for certain.
Q. Okay, who was driving the car when the gun was stolen?
A. I was.
Q. And, who else was in the car?
A. Uh, I had two or three with me that day.
Q. Was one of the two or three with you that day, Mr. Ball?
A. Yeah.
Q. Okay, how did Mr. Ball get into your car?
A. What?

Q. How did Ball get into your car?
A. He walked in.
Q. You mean, he was out driving around with you?
A. Yeah.
Q. Okay, and how long did he drive around with you?
A. About a half a day.
Q. Okay. Now, when he was driving around with you, was the car, or was the gun in the car?
A. Yeah.
Q. Where was the gun at?
A. Back seat.
Q. The next day, did you discover the gun wasn't there?
A. Yeah.
Q. What did you do?
A. I turned it into the Sheriff's Department.
Q. Okay now, where was the gun in the back seat?
A. Laying on the back seat.
Q. Just laying on the back seat?
A. Yeah.
Q. Okay. So the next day, after the gun was stolen, you testify, you reported it to the Russell County Sheriff's Department?
A. Yeah.
Q. Okay. Now sir, did you ever get the gun back?
A. Yeah.
Q. Who gave it back to you?
A. Uh, Paul Stinson.
Q. And, who does Paul Stinson work with?
A. The Sheriff's Department.
Q. The Russell County Sheriff's Department?
A. Yeah.
Q. Now, how many days after the gun was taken from your car, did Paul Stinson give it back?
A. I got it back, let's see, I guess it was a month. About a month.
Q. A month, you say?
A. Yeah.

Q. Okay sir, what did you do with the gun after you got it back?

A. I took it to the flea market and sold it.

Q. Who did you sell it to?

A. I don't know who it was.

Q. Do you remember which flea market it was?

A. Uh, I don't know.

Q. Do you remember how long it was after you got the gun back, that you did sell it?

A. I don't know the exact time.

Q. A month or so?

A. Something like that.

Q. Did you ever sell, give or dispose of that gun, in any way, to Ball, here?

A. No.

Q. And, you never gave him permission to take the gun?

A. I didn't.

Q. Did you ever fire the gun?

A. Yeah.

Q. So that the gun did work?

A. Yeah, it worked.

Q. And, you did notice the gun was gone the day after you and Ball were out riding around in your car?

A. Yeah, the next morning.

Q. Did he ever make any attempt to give the gun back to you?

A. No.

Q. Did he ever talk to you about the gun?

A. No.

Q. Did you ever discuss the gun with him at all?

A. No.

Mr. BONDURANT. That's all.

CROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. Romans, you said that you and Mr. Ball were riding around in your car, is that correct?

A. Yeah.

Q. And, when you stopped the car and Mr. Ball got out, did you get out with him, or were you still in the car? Did you drive him somewhere?

A. Well, I don't know, we drove around half a day, I guess.

Q. But, I'm asking you, when he got out of the car, were you still in the car?

A. I don't know.

Q. Do you remember whether you dropped him somewhere, or you both got out together and went somewhere?

A. No, I don't.

Q. You don't remember?

A. No.

Q. When he got out of the car, obviously he did get out of the car?

A. Oh, yeah.

Q. Did you see him have anything in his hand at all?

A. I didn't see nothin'.

Q. Did you see him reach for anything as he got out of the car?

A. I didn't see him.

Q. Now, Mr. Romans, you said that the gun was stolen that day. Now, you were in the car, and you knew the gun was on the back seat, is that correct?

A. Yes.

Q. And, the next time you missed the gun was the next day, is that correct?

A. The next day, yes.

Q. Now, did you stay in the car the whole time, between the time you knew the gun was there, and the time that the gun was missing, or did you get out of the car? Did you go home, go to sleep?

A. Oh, I got out of the car, I got out of the car a time or two.

Q. You got out of the car? Did you go home and go to sleep, and leave the gun in the car?

A. Yeah.

Q. Okay. Now, you don't know that someone didn't come to that car while you were not there, and take that gun, do you?

A. I just don't know what happened to it.

Q. You don't know what happened to it?

A. That's right.

Q. There was a time there, when you were not in the car, the gun assumably was there, or not, but the next morning it was missing, is that right?

A. Yes, ma'am.

Q. Okay. Mr. Ball—Mr. Romans, you said that you know Mr. Ball. Are you a good friend of his? Do you frequently see him?

A. I just know him when I see him.

Q. Do you frequently see him? I'm sorry, I couldn't hear you.

A. Just a friend.

Q. He's just a friend?

A. Yes, ma'am.

Q. Uh, do you drink together some?

A. Have.

Q. Do you know that Mr. Ball sometimes drinks a good bit?

A. I could.

Q. Are you saying "yes" to that?

A. I'd say "yes".

Mrs. WIDENER. Thank you, very much, That's all.

REDIRECT EXAMINATION

By Mr. BONDURANT.

Q. Sir, one more question. When Ball was in the car with you, were you all by yourselves, or were there some other fellows in the car at that time?

A. There was two or three more, but I didn't know 'em. I don't know how long they stayed with me, or nothin'.

Q. So, in other words, you were just out riding around having a few beers that day?

A. I'd say.

Q. Picking up a few people here and there?

A. Yeah.

The COURT. Are both sides through with this witness?

RECROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. *Ball,* what did you with the gun?

A. I took it to the flea market and sold it.

Q. You took it to the flea market and sold it? Why didn't you bring the gun here, if there was a question about the gun?

A. I didn't know anything about it.

Q. You didn't——

A. I took it to the courthouse, is all, to the courthouse on business.

Q. But, you didn't bring it here?

A. No, ma'am, I didn't bring it here.

Q. So we could see it, or identify it?

A. No.

Q. You went on and sold it? Okay, thank you.

The COURT. Wait just a minute, just stand right there.

By Mrs. WIDENER (continues examination).

Q. One more question, sir, would you please go back? (Witness resuming stand.) When you got the gun back from Mr. Stinson, do you remember when it was taken away from you? The police took it and gave it back to you?

A. No, it was about a month before I got it back.

Q. Okay now, when you got it back, did you fire the gun after you got it back?

A. Yeah.

Q. So that you knew that it was working?

A. Yeah.

Mrs. WIDENER. Okay, that's all.

Mr. BONDURANT. I call Mr. Clarence Harrel Muzic.

The COURT. May this witness be excused?

Mr. BONDURANT. Uh, no, sir.

The COURT; You remain out there, please.

CLARENCE HARREL MUZIC, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay sir, would you please state your name for the jury?

A. Clarence Muzic.

Q. Where do you live, sir?

A. Honaker.

Q. Do you know the defendant, Truman Lewis Ball?

A. Yes, sir.

Q. About how long have you know him?

A. Well, I've known him ever since he was a little boy.

Q. And, that's been some thirty-some years, roughly?

A. Yeah, that's so.

Q. Sir, during June of '82, did Truman Lewis Ball pull a gun on you?

A. Yes, sir.

Q. Okay, where were you at when Ball pulled the gun on you?

A. I was, uh, in my yard.

Q. At your house?

A. Yes, sir. Yes, sir.

Q. Okay. And, why did Ball pull the gun on you?

A. Well, him and Combs come up the road there.

Q. Okay now, who's this Combs?

A. Gary Combs.

Q. Gary Combs? Okay, go ahead.

A. And, uh, they come up there, and they started in, they was a drinkin', you know. And, I told him I didn't want him up there.

Q. Okay. Up there at your house?

A. Yes, sir. They started over across the creek toward my house, and the Combs boy went back down the road. Then Truman, he pulled a gun at me.

Q. Okay, did he aim the gun at you?

A. He pointed it at me.

Q. Okay. What did he say when he aimed the gun at you?

A. He said, "Come over to the road." He told me to come by me in the road.

Q. What did you do then?

A. I went in the house.

Q. Okay now, what kind of gun did Ball pull on you?

A. Well, I couldn't tell you that.

Q. Okay.

A. It was a white handle, it looked like it had white handles on it, and nickel plated, and that's all I can tell you.

Q. Was it a large gun, like a——

A. No, it was a small like gun.

Q. Like maybe a thirty-eight, a thirty-two?

A. It was like a thirty-eight or a thirty-two. It didn't look like a twenty-two.

Q. Okay now, after you went into the house, after Ball pulled the gun on you, what did you do then?

A. Well, I closed the doors.

Q. I'm sorry, you did what?

A. I closed the doors.

Q. Yes, sir.

A. Shut the doors, and stayed in there 'til he went back down the road.

Q. And, after that what did you do?

A. Uh, after he went back down the road, I got one of my neighbors up there, come up in a truck, and I got him to come over, to come over to Lebanon, and they took a warrant for him You know, to pick him up.

Q. Okay, sir. So, in other words, you called the law?

A. Year, and then after a while, Truman come back. You know he come back by hisself.

Q. Uh-huh.

A. And, uh, when he come back by hisself, he hollered over to the house, and asked me, was we there, you know. Was I there, or was my boy, or somebody? I wouldn't say

whether he was hollerin' to me or one of my boys. They thought he was, one of 'em was there. And, he went on, he went on up the holler there, to Gary Muzic, and I went back down the road to Miss Tashfull below me. She's one of my neighbors, and she called the law on him, again on him.

Q. Okay. So, he went up past your house, up the holler, up to Gary Muzic's house?

A. Yes, sir.

Q. Okay now, is Gary Muzic related to you?

A. Yeah, he's my first cousin.

Q. Okay. And, he lives up the hollow from you?

A. Yeah, he lives up the hollow from me.

Q. And, this happened the same day, now?

A. Yes, sir.

Q. Okay, and how far does Gary Muzic live up the hollow from you?

A. Well, I just don't know how far it is. I'd say it's four or five hundred feet, I reckon.

Q. Okay.

A. Maybe further than that, I don't know.

Q. Okay. Now, did the cops come after Ball?

A. Yes, sir.

Q. What did they do with him?

A. I don't know, they went up there and got him.

Q. So, they come and picked him up?

A. Yes, sir, they went up there and got him.

Mr. BONDURANT. That's all I have.

CROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. Muzic, you say that you went up and swore out a warrant?

A. Yes, *sir.*

Q. What happened under that warrant?

A. I dropped it.

Q. Why did you drop it?

A. Well, I just dropped it on him.

Q. Did you have a conversation with him?

A. Well, the warrant never was tried. I just told the prosecuting attorney, I wanted to drop it.

Q. And, did you give him a reason?

A. No, *sir.*

Q. Did you tell Mr. Ball there was a reason you were going to drop it?

A. No.

Q. You did not see Mr. Ball in the hall of the courthouse?

A. Yes, *sir.*

Q. And, had a conversation with him? What did Mr. Ball—what did you say to Mr. Ball?

A. I didn't say anything to him.

Q. But, you just told me you had a conversation with Mr. Ball.

A. Well, he asked me, was I gonna drop it, and I told him, "Yes, I would drop it." I'd rather have a friend of a dog, as to not have him, you know. I don't want nobody to be enemy to me. And, I'll tell you what I told him. I said, "If you won't bother me no more, and don't come about me, and don't ever bother me anymore, then", I said, "I'll drop the warrant." Now, that's what I told the man.

Q. I see. And, your statement is then, that you——

A. And, he promised not to bother me, or not come mess with me anymore.

Q. And, you wanted to keep friends, is that right?

A. That's right.

Q. Mr. Muzic, you've lived in Honaker a long time, is that right?

A. Yes, *sir.*

Q. How long have you lived there?

A. I lived there all my life.

Q. All of your life? And, do you know a family by the name of Crabtree?

A. Yes, *sir,* I sure do.

Q. And, wasn't Mr. Ball married to a Crabtree at one time?

A. Yes, *sir.*

Q. And, Mr. Muzic, could you say, in your experience, that there was bad blood between the families of the Muzics and the Crabtrees?

A. Well, I—well, I'll just tell you the way it is, the way it was. One of my sons was with another boy when they killed two of the Crabtrees.

Q. Two Crabtrees, and then a girl who was engaged to one of them, is that correct, three? There were three that died?

A. Yeah, three of them.

Q. Yes.

A. But, my son had nothin' to do with it. He was just with that boy.

Q. And, this was a——

A. And, that's all there is to it.

Q. And, your boy, wasn't it one of your sons, and then your son-in-law?

A. Yes, *sir.*

Q. Yes, it was. And, did your boy—was your boy convicted of this?

A. Yes, *sir.* Well, he plea bargained for so much time.

Q. All right, but he is now serving sentence, is that correct?

A. Yes, *sir,* that's right.

Q. And, Mr. Muzic, are you telling me that there is no bad blood between those two families, the Crabtrees and the Muzic, over three deaths?

A. Well, I don't think you're tryin' the Crabtrees and the Muzics, you're tryin' Mr. Ball, ain't cha?

Q. Well, I'm asking you, is there any bad blood between the Muzics and the Crabtrees?

A. I don't know nothin' about that.

Q. You don't know of any bad blood?

A. (No response.)

Q. Mr. Muzic, before this alleged incident with Mr. Ball occurred, wasn't there an incident about your house,

about some windows, or something? Would you mind telling us about that incident, and what it was?

A. Yes, *sir,* I can tell you about it. Somebody come and shot in my house. You understand, somebody come and shot in it.

Q. Uh-huh.

A. And, I was told that Truman, Ray Crabtree and Gary Combs was the three that shot in the house. And, that's when Truman come up there, and I told him I didn't want him back up there anymore. I'd heard that he shot in my house. And, that's when he pulled the gun on me.

Q. And, now you're telling me though, that there's a series of events here, between the Crabtrees and the Muzics families, when they seem to be shooting at each other quite a lot, isn't that right, sir? Would you answer the question?

A. No, *sir,* I ain't shot at anybody.

Q. No, you haven't, but the two families have, isn't that correct?

A. I don't know if, uh—I don't know that the Muzics ever shot at anybody.

Q. Well now, didn't the Muzics shoot some of the Crabtrees? Didn't they murder some of the Crabtrees?

A. No, *sir,* they sure didn't.

Q. What did they do?

A. Well, they didn't do anything.

Q. Well, who was the boy who shot the two Crabtrees and the fiancee?

A. Wayne Hess.

Q. Wayne Hess, and who was the other boy?

A. Charlie Muzic, my son.

Q. Your son?

A. But, he didn't shoot anybody.

Q. But, he's convicted of shooting someone, isn't he?

A. No, *sir,* he's never been convicted. He got convicted for being with him, is all.

Q. By being with the boy?

A. That's right.
Q. But, now the other boy is your son-in-law?
A. That's right.
Q. Okay, so he's a member of your family?
A. That's right.
Mrs. WIDENER. I thank you, Mr. Muzic, that's all.

REDIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay, Mr. Muzic, have you ever shot anybody?
A. No, sir.
Q. But, you've had your house shot up?
A. Yes, sir.
Q. And, Ball pulled a gun on you?
A. Yes, sir.
Mr. BONDURANT. Thank you, sir.

RECROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. Muzic, I have one more question. We were talking a few minutes ago about that original warrant, and the fact that you dropped the warrant. Didn't you tell the Commonwealth's Attorney, and didn't you tell Mr. Ball, that the reason you were dropping the charges was because you never did see the gun, but——
A. No, *sir.*
Q. [Continuing] you were just mad at the time?
A. No, *sir,* I did not.
Q. That was not the statement you made to those people?
A. No, *sir,* it sure isn't.
Mrs. WIDENER. Thank you.

REREDIRECT EXAMINATION

By Mr. BONDURANT.

Q. Sir, while all this other activity was going on here, did someone attempt to burn your house down, too?
A. Yes, sir.

Mrs. WIDENER. Objection.
Mr. BONDURANT. Your Honor, I think she opened the door.
The COURT. Well, I'll overrule the objection. You shouldn't have gone into all of this first. I'll permit you to go into it, but you're getting a little bit far afield, though. That's all right. I'll overrule the objection.

By Mr. BONDURANT (continues examination).

Q. Sir, did you ever find out who threw the gas in your yard?
A. No, sir, I didn't.
The COURT. Well, I'm going to sustain the objection. Let's don't go any further into it than that.
Mr. BONDURANT. That's all I have, Your Honor.
Mr. FRACKELTON. I think the Court should instruct the jury on that.
The COURT. Well, I've struck the question and the answer. Do you want to ask him anything else? All right, stand aside.
Mr. BONDURANT. We call Mr. Gary Muzic.

GARY M. MUZIC, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay, sir, would you please state your name for the jury?
A. Gary M. Muzic.
Q. Well, you're going to have to speak up so the person down at the end can hear you.
A. Okay. Gary M. Muzic.
Q. Okay, sir, where do you live?
A. Uh, Honaker.
Q. Okay, and you live close to a Clarence Muzic?
A. Yes, sir, I live just up the hollow, a quarter of a mile, I guess.
Q. Okay. Do you know the defendant, Ball?
A. Yes.

Q. And, how long have you known him?

A. Well, I guess about all of his life, I've knowed him.

Q. Sir, during June of 1982, did Ball offer to sell you a gun?

A. Yeah.

Q. Where did he make that offer?

A. It was there in the house, down at the holler, when I first met up with him, that day, or it was right down below the house.

Q. Sir, you're going to have to speak up. I don't think anybody can hear you.

A. It was when he first got up there, below the house, in the road, or in the house, one.

Q. Okay. But, it was around your house someplace?

A. Yes. It would be either in the house or below the house, one or the other.

Q. Okay now, did Ball come to your house that day?

A. Yes.

Q. Okay. So, he came to your house with the gun?

A. He had the gun when he went into the holler to get there.

Q. Okay, and he offered to sell this gun to you?

A. Yes, sir.

Q. Okay, sir. What kind of gun was it?

A. Well, just a pistol. A small like gun, a pistol.

Q. Did it have blue tint or nickel finish?

A. Well, I'm not sure about the color, but I know it had pearl handles. But, I don't know about that.

Q. Okay, was it a smallish gun?

A. Yes, sir, small.

Q. Did you buy the gun?

A. No.

Q. Did you already own a gun like that?

A. No.

Q. Okay. Now, while Ball was in your house, did some law enforcement officers come to your house?

A. Yes, sir.

Q. Why did they come to your house?

A. 'Cause Clarence had gone and taken out a warrant on the pistol, for drawin' a pistol on him.

Q. So, the law enforcement officers had some arrest warrants for Ball?

A. Yeah.

Q. Okay. Did Ball talk to the deputies when they came to your house?

A. No. He turned and ran. He started out the door when they come up to the door.

Q. Okay now, let's just get this in proper sequence, here. They came up to your door?

A. Well, we was leavin', we was just leavin'. When we opened the door, they stood there. They were standin' there, one of them. Uh, I think it was Paul.

Q. Paul who?

A. Paul Stinson.

Q. And, he works for the Russell County Sheriff's Department?

A. Yes, sir, he was standin' there when we opened the door.

Q. Okay. What did Ball do when he saw Paul Stinson?

A. Well, he didn't do nothin'. But, this deputy called and told him he had a warrant for him, and he turned and run.

Q. Okay now, when Truman turned, he was still inside the house?

A. Yes, sir.

Q. Okay, when Truman turned and ran, did you see anything in his back pocket?

A. Yeah, he had the pistol there, stickin' out of his back pocket.

Q. Now, is this the same pistol he tried to sell you earlier

A. Yes.

Q. Okay. What did the police officers do at that point?

A. He just jerked me around and came runnin' in after Truman, tellin' him to drop it.

Q. Okay, where did Truman run to in the house?

A. Just into another room, bedroom, right there at the door, that just cut off that room to the right. Truman just went in there.

Q. Okay, did the police officers place him under arrest?

A. Yes, sir.

Q. Did he find the gun?

A. Yes, sir, he was back in the room, when he got the gun.

Q. So, he found the gun in the bedroom?

A. Yeah.

Q. Was this the same bedroom that Truman just had run in to?

A. Yeah.

Q. Okay. And, the gun he found was the same gun that Ball tried to sell you earlier?

A. Yeah.

Q. Now, did you have an occasion to discuss this gun with Ball, two or three months ago?

A. With who?

Q. Ball.

A. Yes.

Q. Truman Ball?

A. He wanted me to say the gun was there, and that he was gonna get his gun back, that he just picked it up in a bag of beer that night, and he was going to give it back to him.

Q. Okay, so let's go again. So, that Ball come to your house?

A. Yes.

Q. Did Ball ask you to lie for him, today in Court?

A. Yes. He wanted me to say the gun was there, and there wouldn't be nothin' to it. And, he was gonna give the gun back, so there wouldn't be nothin' to it.

Q. Okay, and where did Ball say he got the gun from?

A. He said he got it out of a bag, it'd gotten mixed up with—that they got beer out of, out of Romans' car.

Q. Okay, and this is Hubert——

A. Romans.

Q. Hubert Romans? So, Ball said he got the gun out of Hubert's car?

A. Yes, he said it was in the bag he got the beer in.

Q. Okay, sir, and obviously you decided not to lie here today?

A. No, I didn't.

Mr. BONDURANT. That's all.

CROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. Muzic, I'm having some difficulty hearing you, and I wish that you would speak up, if you could please. Uh, when you were telling the story a minute ago, I thought I heard you say, the police officers told, came in and told Truman to drop it?

A. Yeah.

Q. Is that right?

A. Yeah.

Q. And, then you went on to say that they found it in his back pocket?

A. No, Truman had it in his back pocket, and when he turned around, that's when they seen the gun.

Q. That's when you saw the gun?

A. No. That's when they saw the gun.

Q. That's when the police officer told him to drop it?

A. Yeah. They come in runnin'.

Q. Had he pulled the gun?

A. No, *sir,* he hadn't pulled the gun.

Q. Mr. Muzic, had Truman been drinking that day?

A. Yes, he had a bottle of liquor with him, in his hand, when we started out the door.

Q. And, would you think that maybe he's had a good bit to drink?

A. Well, right smart.

Q. All right. And, can you tell me, if you know, whether Truman was married to Nancy Crabtree, at one time?

A. Well, I'm not for sure, but they said he was married before. But, I didn't know who, know for sure.

Q. I see. Do you know the Crabtree family?

A. Part of it.

Q. Would it be fair to say that the Muzics and the Crabtrees have some bad blood between them?

A. Yeah, they, Clarence and them have had, but I ain't had no trouble with no Crabtree.

Q. But the families, each family, they——

A. Yes.

Q. Can you tell me something about the families, and what might constitute that bad blood?

A. Well, I guess, where Clarence's boy and that Hess boy killed John Morgan and that bunch, I'd say.

Q. And, would you say that ever since then, they've been at odds with each other, or sort of fighting all the time? Would that be——

A. I don't know about all the time, but they have been having a little trouble.

Q. Every now and again, one'll do something to the other side is that right?

A. Yeah.

Mrs. WIDENER. Thank you.

Mr. BONDURANT. That's all of this witness.

The COURT. Step aside.

Mr. BONDURANT. We call Paul Stinson.

PAUL HENRY STINSON, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

Q. Okay, sir, would you please state your name for the jury?

A. Paul Henry Stinson.

Q. And, what's you occupation, sir?

A. I'm a Deputy Sheriff for Russell County.

Q. Okay, sir, do you know the defendant, Truman Lewis Ball?

A. Yes, I do.

Q. About how long have you known him?

A. About two years or three, a little over two.

Q. Sir, in June of 1982, did you receive a couple arrest warrants, to serve on Ball?

A. Yes, I did.

Q. What was the precise date of those arrest warrants?

A. (Going through file.) June the 11th, '82.

Q. Okay sir, and did you arrest Ball that day?

A. Yes, I did.

Q. Where did you arrest him at?

A. At Gary Muzic's place, on Thompson Creek.

Q. Is that over near Honaker?

A. Yes, it is.

Q. Okay. Now, explain to the jury, what happened when you went to Gary Muzic's house to arrest Ball?

A. I went to arrest him at Mr. Gary Muzic's. I knocked on the door, Mr. Muzic came to the door. I asked Mr. Muzic if Truman was there. He advised, "yes". And, at that time Mr. Ball come to the door. I advised Mr. Ball that I had two warrants on him, one for brandishing a firearm, and the other one for cursing and abuse. Uh, Mr. Ball advised me that he was not going. At that time, he turned to the left and started back through the house. At that time, I say a pistol—revolver—pistol in his right rear pocket. I could see the top portion of the gun, the butt and the cylinder was sticking out his pocket. At that time, I went ahead, went into the residence behind Mr. Ball. He went into a bedroom at the right of the house. The room was dark. As I started through the door, I caught ahold of Mr. Ball, and brought him out to where we could see him. At that time, there was another officer there, also. Myself and him, we frisked Mr. Ball, and put the cuffs on Mr. Ball, which the gun was gone from his pocket, at that time. Okay, I went to step back into the room, I found the gun laying on the bed.

Q. Okay, and what kind of gun was that?

A. It was a thirty-two Rossi, nickel with pearl handles.

Q. Okay, and did you take down the serial number off of that gun?

A. Yes, I did.

Q. Could you tell what the serial number is, to the jury?

A. The serial number is C234558.

Q. So, sir, then you did take the gun?

A. Yes, I did.

Q. And, did you take Mr. Ball, too?

A. Yes, I did.

Q. What did you finally do with the gun?

A. Well, the gun, after everything was over, uh, was taken to the Sheriff's Department, which I ran a check on it, which it did come back stolen. They had a report there, it was stolen from Mr. Hubert Romans. Uh, Mr. Ball was charged with possession of stolen property. The Commonwealth, he nolle prossed the charge. The weapon then was signed back to the owner of the gun, which was Mr. Romans.

Q. So, you gave the gun back to Mr. Romans?

A. Yes, sir.

Q. Do you know why the Commonwealth's Attorney nolle prossed that charge?

A. From what I understood from the prosecutor, Mr. Romans would not testify on it.

Mr. BONDURANT. That's all.

CROSS EXAMINATION

By Mrs. WIDENER.

Q. Mr. Stinson, when you were at the house making the arrest, did Mr. Ball have a bottle in his hand?

A. No, he didn't have a bottle in his hand.

Q. And, when he—you testified that he turned to go into the room?

A. Right.

Q. Did he have the gun in his hand?

A. No, he didn't. It was in his rear, right rear pocket.

Q. It was in his right rear pocket? And, what time of day was this?

A. 8:00 o'clock.

Q. In the morning?

A. Afternoon.

Q. 8:00 o'clock in the afternoon? You mean, 8:00 o'clock at night?

A. Right.

Q. Okay, And, you say you followed him into a dark room, is that right?

A. Yes.

Q. And, you followed him into a dark room, even though you knew he had a gun?

A. Yes, I did.

Q. And, when you went into that dark room, you were able to see the gun on a bed, even though the room was dark?

A. The room was dark, but there was light from the other room we were in to start with. There was no door. If there was, it was open. There was enough light going into the room where you could see the nickel plated gun laying on the bed, with the pearl handles.

Q. I see. Now, about this warrant. You say that it was nolle prossed, is that correct?

A. Yes, it was.

Q. And, what happened then, between that time, and didn't you know that this gun was going to be involved in some other charge, at that time?

A. No, I didn't.

Q. You did not? So, you gave it back to Mr. Romans, rather than keep it for some other charge, you just gave it back to him?

A. That's right.

Q. And, are you testifying, and let me make sure I have this right. You testified that the warrant wasn't prosecuted, and why did you say it wasn't prosecuted?

A. Well, what I understood from the Commonwealth, when I reported on it, it was already nolle prossed then. The Commonwealth, if I'm correct, the attorney, he said that Mr. Romans would not testify.

Q. Mr. Romans would not testify?

A. That's right, Mr. Romans would not testify.

Q. Did he say anything about Mr. Muzic testifying?

A. No, he didn't.

Mrs. WIDENER. Okay. Thank you.

REDIRECT EXAMINATION

By Mr. BONDURANT.

Q. I think we got a little confused here. The case that you went on, when Ball was charged with possessing a stolen gun?

A. Right.

Q. That was a whole different case from the problems with Clarence Muzic?

A. Right. Muzic's case, I didn't have to appear on, because I just served the warrant. All I done was serve the warrant.

Q. Okay. So, you appeared on the charge that came later, the possession of the stolen gun?

A. Right.

Q. Which Hubert Romans wouldn't testify against Ball?

A. Right.

Q. Okay. Now, you talk about it being dark, you said you went and picked up Ball about 8:00 o'clock. Did the bedroom have a window in it?

A. No, it didn't.

Q. It didn't?

A. It didn't.

Mr. BONDURANT. That kills my next question, then. Thank you.

RECROSS EXAMINATION

By Mrs. WIDENER.

Q. You say that it was dropped, because Hubert Romans wouldn't testify?

A. Right.

Q. And, he wouldn't testify that Mr. Ball stole the gun, is that correct? Is that why it was dropped? What wouldn't he testify to?

A. Well, I'm not sure why he wouldn't testify. When I went to Court on the case, the Commonwealth's Attorney said he nolle prossed the case, because Mr. Romans would not testify. He didn't elaborate why.

Q. He would not testify, and the charge was possession of a stolen gun?

A. Possession of a stolen gun.

Q. And, it was dropped because Hubert Romans would not testify to something? Apparently, he was the star witness in that case, is that correct?

A. Yes.

Mrs. WIDENER. One more question, if I may.

Mr. BONDURANT. Sure, go ahead.

By Mrs. WIDENER (continues examination).

Q. Although the two incidents, although this charge and that warrant were different cases, so to speak, under the law, they both arose out of the same incident, is that not correct? I just want to clear that up for the jury.

A. Well, I don't understand what you're saying.

Q. Well, this charge comes out of the fact that Mr. Ball allegedly had a gun, and you were there on a warrant that Mr. Muzic had gotten sworn out, because Mr. Ball allegedly had a gun. In other words, both of those charges arose out of the same occurrence, the same day, is that not correct?

A. That's right.

Mrs. WIDENER. Thank you very much. That's all.

REREDIRECT EXAMINATION

By Mr. BONDURANT.

Q. Just a couple of questions. Hubert Romans did report the gun stolen?

A. Yes, he did.

Q. Okay. How many days after he reported the gun stolen, did you take it off Ball?

A. It was one or two days after he made the report that it was stolen.

Q. So, you took the gun off Ball June the 11th, so Hubert Romans reported it a day or two before, June 8th or 9th, or something like that?

A. No, it was after.

Q. Oh, he reported the gun stolen after you took it off Ball?

A. After, yeah.

Q. Okay now, at the time that you took the gun off Ball, did you know that he was a convicted felon?

A. Well, I don't know, you know. I'd known he'd been in prison.

Q. But, you didn't think in terms of him being a convicted felon, with the gun?

A. No.

Q. I assume it's common practice, when you find the property that was stolen, to give it back to the rightful owner?

A. Right.

Q. At the time, these State cases were the only active cases against Ball?

A. (Nodding head "yes".)

Mr. BONDURANT. Thank you.

The COURT. Is this a good place to stop, or do you want to call another witness?

Mr. BONDURANT. I have two more to call, so we could stop here.

The COURT. All right, let's take a recess for lunch. Ladies and Gentlemen, we'll recess for lunch until approximately 1:30. Do not discuss the case with anyone, nor let anyone discuss it with you. Don't discuss it among yourselves. The Marshal will take you to lunch, and return at approximately 1:30.

(Luncheon recess from 12:29 o'clock p.m. to 1:45 o'clock p.m.)

(The trial continued before the Court and jury).

Mr. BONDURANT. I call Mr. Jim Silvey.

JAMES G. SILVEY, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

By Mr. BONDURANT.

United States District Court

United States of America vs.

DEFENDANT: TRUMAN LEWIS BALL
General Delivery, Honaker, VA
SSN: 289-72-8222

WESTERN DISTRICT OF VA - ABING[illegible]ON

DOCKET NO. 83-00044-A
AMENDED

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: 09 DAY: 28 YEAR: 83

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jo Widener
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of 18:922(h)(1) & 924(a) 18:1202(a)(1) Receipt of firearm by convicted felon and possession of firearm by convicted felon.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years as to Count 1.

IT IS ADJUDGED that on Count 2 that defendant is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of Two years however execution of sentence of imprisonment as to Count 2 is suspended and defendant placed on probation for a period of Two years to commence upon defendant's release from confinement as to Count .

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

A TRUE COPY, TESTE:
Joyce F. Whitt, Clerk
by: L. Roberts
Deputy Clerk

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Glen M. Williams
Glen M. Williams

DATE 10-3-83

BEST AVAILABLE COPY

In the United States District Court for the Western District of Virginia

Abingdon Division

Criminal No. 83-00044-A

UNITED STATES OF AMERICA, PLAINTIFF

v.

TRUMAN LEWIS BALL, DEFENDANT

ORDER

This case is before the court on the defendant's motion for reduction of sentence, and the court, having considered the motion of the defendant and the Government's response, it is hereby ADJUDGED and ORDERED that the motion for reduction of sentence is overruled.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 1st day of November, 1983.

GLEN M. WILLIAMS,
United States District Judge.

A true copy,
Teste:

JOYCE F. WITT,
Clerk.

(By) L. ROBERTS,
Deputy Clerk.

United States Court of Appeals for the Fourth Circuit

No. 83-5253

UNITED STATES OF AMERICA, APPELLEE

v.

TRUMAN LEWIS BALL, APPELLANT

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. GLEN M. WILLIAMS, District Judge. (CR 83-00044-A)

Argued: March 9, 1984. Decided: May 8, 1984.

Before RUSSELL and CHAPMAN, Circuit Judges, and FRANK A. KAUFMAN, District Judge for the District of Maryland, sitting by designation.

Jo S. Widener (Widener and Frackelton on brief) for Appellant; Jennie L. Montgomery, Assistant United States Attorney (John P. Alderman, United States Attorney on brief) for Appellee.

Corrected Opinion, Unpublished to Published.

RUSSELL, Circuit Judge:

Defendant Truman Lewis Ball was convicted, following a jury trial, of the offenses of receipt of a firearm by a convicted felon, 18 U.S.C. §§ 922(h)(1) and 924(a), and possession of a firearm by a convicted felon, 18 U.S.C. App. § 1202(a)(1). Both offenses involved the same firearm. The District Court sentenced Ball consecutively to three years imprisonment on the receipt offenses, and two years imprisonment on the possession offense suspended to two years probation, denying a motion for change of sentence under Fed.R.Crim.P. 35.[1] Defendant appeals, challenging only the validity of the sentence imposed.

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[1] The Rule 35 motion was submitted after the within appeal was noted. Once the appeal was filed, the District Court was without jurisdiction to entertain it. *United States* v. *Johns*, 638 F.2d 222, 224 & n.3 (10th Cir. 1981); *United States* v. *Garrett*, 583 F.2d 1381, 1391 (5th Cir. 1978); *United States* v. *Mack*, 466 F.2d 333 (D.C. Cir.), *cert. denied*, 409 U.S. 952 (1972).

We have jurisdiction to hear the appeal, notwithstanding the pendency of a motion before the District Court for reconsideration of the denial of the Rule 35 motion, since finality attaches with sentencing. *Berman* v. *United States*, 302 U.S. 211, 212 (1937). We determined in *United States* v. *Burton*, 629 F.2d 975, 978 (4th Cir. 1980), *cert. denied*, 450 U.S. 968 (1981), that Congress did not intend to authorize cumulative punishment under 18 U.S.C. § 922(h)(1) and 18 U.S.C. App. § 1202(a) where unlawful possession of the firearm in question is incidental to unlawful receipt of the same gun. The Government concedes on appeal, as it must, that *Burton* is controlling and that the sentencing scheme of the District Court is illegal. Thus, the only issue before us is one of remedy. The remedy applied in *United States* v. *Wilson*, 721 F.2d 967 (4th Cir. 1983) of vacating both sentences and remanding for resentencing is inappropriate here due to the absence of any double jeopardy problem with these statutes, as we determined in *Burton*, 629 F.2d at 977. Rather, Congress in these firearms statutes created separate offenses, but did not authorize pyramiding penalties. *Id.* Accordingly, we follow *Burton* and remand with instructions to modify the sentences so as to make them run concurrently.

Reversed and remanded with instructions.

In the United States District Court for the Western District of Virginia

Abingdon Division

Criminal Number 83-00044-A

UNITED STATES OF AMERICA, PLAINTIFF

v.

TRUMAN LEWIS BALL, DEFENDANT

ORDER

In accordance with the mandate of the United States Court of Appeals for the Fourth Circuit, in its Order of May 8, 1984, it is hereby ADJUDGED and ORDERED that the sentence imposed in Count 2 of the indictment shall run concurrently with the sentence imposed in Count 1.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 6th day of July, 1984.

GLEN M. WILLIAMS,
United States District Judge.

A true copy.
Teste:

JOYCE F. WITT,
Clerk.

(By) L. ROBERTS,
Deputy Clerk.

Supreme Court of the United States

No. 84-5004

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

OCTOBER 1, 1984.

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RESPONDENT'S

BRIEF

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No. 84-5004

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner may be convicted and concurrently sentenced under 18 U.S.C. 922(h)(1) for unlawful receipt of a firearm and under 18 U.S.C. App. 1202(a)(1) for unlawful possession of the same firearm.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-5004

TRUMAN LEWIS BALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 37-38) is reported at 734 F.2d 965.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1984. The petition for a writ of certiorari was filed on July 6, 1984 and was granted on October 1, 1984 (J.A. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner, a previously convicted felon, was found guilty of receipt of a firearm, in violation of 18 U.S.C. 922 (h)(1), and possession of the same firearm in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to consecutive terms of three years' imprisonment on the receipt count and two years' imprisonment on the possession count, suspended in favor of two years' probation. J.A. 34. On appeal, the sentences were ordered to be made concurrent, and the government has not sought review of that decision.

1. The evidence adduced at trial showed that in October 1981, Elliot Brothers of South Carolina shipped a .32 caliber Rossi revolver to McGlothlin's Store in Honaker, Virginia (J.A. 4-5). On February 22, 1982, McGlothlin sold the revolver to Hubert Romans (J.A. 6-7). Sometime during the late spring of 1982, petitioner was a passenger in Romans' car. The morning after petitioner had been in the car, Romans noticed that the revolver, which had been lying on the back seat of the car, was missing. Romans reported the incident to the local police (J.A. 8-9).

Within a few days thereafter, petitioner pointed a gun at Clarence Muzic that fit the description of Romans' revolver (J.A. 14-15). Muzic notified the police of this incident (J.A. 15-16). When petitioner later reappeared at Muzic's residence, Muzic summoned the police (*ibid.*). The police located petitioner as he was leaving the house of Gary Muzic, to whom he had attempted unsuccessfully to sell the gun. When the police told petitioner that they had a warrant for his arrest, he turned and ran into the bedroom of Muzic's house. J.A. 22-24. One of the police officers noticed a gun in petitioner's back pocket (J.A. 23). Romans' gun was found in the bedroom into which, petitioner had fled (J.A. 24). The parties stipulated that petitioner previously had been convicted of the state felony of threatening a dwelling house (J.A. 2-3).

2. Following sentencing, petitioner filed with the district court a motion for reduction of sentence contending that the Double Jeopardy Clause "do[es] not permit cumulative sentences" for the two offenses of which petitioner was convicted (Motion for Reduction of Sentence at 1). The district court denied the motion; petitioner thereafter moved for reconsideration, specifically requesting that his sentences "run concurrently" (Motion for Reconsideration at 5). This motion also was denied.

The government conceded in the court of appeals that under the Fourth Circuit's decision in *United States* v. *Burton*, 629 F.2d 975 (1980), cert. denied, 450 U.S. 968 (1981), consecutive sentences could not be imposed for unlawful receipt and unlawful possession of the same firearm, where the unlawful possession of the firearm was incident to its unlawful receipt. The court of appeals remanded the case to the district court with instructions to modify the sentences by making them concurrent (J.A. 38), a remedy requested by petitioner.[1] On October 1, 1984, this Court granted the petition for a writ of certiorari (J.A. 41).

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[1] On remand, the district court issued an order stating that the sentences "shall run concurrently" (J.A. 39).

SUMMARY OF ARGUMENT

1. Petitioner received consecutive sentences of three years' imprisonment for unlawful receipt of a firearm and two years' probation for unlawful possession of a firearm. In the district court and the court of appeals petitioner claimed that this cumulative punishment was improper, and sought either the vacation of one of the sentences or an order directing that the sentences run concurrently. Petitioner obtained the latter remedy in the court of appeals, but now seeks the vacation of one of his convictions. Since petitioner challenged only the cumulative punishments in the courts below and did not previously present the arguments upon which he now relies, the issue should not be considered by this Court.

2. Petitioner appears to make two alternative arguments in support of his contention that one of the convictions should be vacated. He first asserts that Congress did not intend to permit a defendant to be prosecuted simultaneously for both receipt and possession of the same firearm, and that the government therefore may charge a defendant with only one of the two offenses. Second, he argues that his two convictions and concurrent sentences amount to multiple punishment prohibited by the Double Jeopardy Clause. Both of these contentions are incorrect.

a. In *United States* v. *Batchelder*, 442 U.S. 114 (1979), this Court concluded that Congress intended to create two overlapping offenses in enacting these statutes. Since a prosecutor typically may proceed against a defendant under several statutes, there can be no bar against simultaneous prosecutions under these provisions. Moreover, the rule proposed by petitioner apparently would force the government to

elect before trial whether to prosecute only for possession or only for receipt, even though different penalties apply to the offenses and different proof may often be adduced as to each. Such a requirement of pre-verdict election would unjustifiably handicap enforcement of the firearms laws without affording any proper benefit to a defendant. Even after verdicts have been returned, and granting a congressional intent to foreclose cumulative punishment for receipt and possession of the same firearm, nothing in the language or history of the statutes suggests a bar against entry of convictions and concurrent sentences.

b. Petitioner's double jeopardy claim is meritless. Since the receipt and possession charges were tried in a single proceeding, the protection against successive prosecutions is not implicated, only that against multiple punishments. However, a second conviction for which only a concurrent sentence has been imposed does not constitute punishment in circumstances where, as here, the additional conviction will not increase the defendant's prison term and will not impose any other adverse consequences upon the defendant.

ARGUMENT

This case concerns two overlapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 *et seq.*, which prohibit convicted felons such as petitioner from engaging in a variety of conduct relating to firearms. The first, 18 U.S.C. 922(h), prohibits the receipt of a firearm by such persons, and carries a penalty of up to five years' imprisonment (see 18 U.S.C. 924(a)). The second, 18 U.S.C. App. 1202(a), bars not only

receipt but also transportation or possession of a firearm, but imposes a lighter penalty—a maximum of only two years' imprisonment. Petitioner was found guilty at trial of unlawful receipt of a firearm, in violation of Section 922(h)(1), and unlawful possession of a firearm, in violation of Section 1202(a)(1). He received consecutive sentences on these two convictions of three years' imprisonment and two years' probation, respectively.

In both the district court and the court of appeals petitioner's sole complaint related to the fact that consecutive sentences had been imposed. The government conceded in the court of appeals that the cumulative sentences were improper because both convictions were based upon the same facts. The court of appeals concurred with the parties that cumulative punishment was improper and, as petitioner requested, ordered that the two sentences be made to run concurrently.[2]

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[2] Since the government conceded below that cumulative punishment is improper under the facts of this case and we have not sought review of the court of appeals' decision implementing the concession, this case provides no occasion for this Court to address the question whether cumulative punishment for convictions under these two statutes is appropriate under these or other circumstances. We note that cumulative punishment would surely be appropriate if the defendant had possession of the firearm on one occassion and, after giving up possession, later reacquired the firearm (see *United States* v. *Robbins*, 579 F.2d 1151 (9th Cir. 1978)), and may also be proper if there is some other significant distinction between the facts relied upon to prove the two offenses. Such punishment also may be appropriate where the charges are based upon the receipt of different weapons at different times (see *United States* v. *Filipponio*, 702 F.2d 664 (7th Cir. 1983))

Petitioner now contends that the court of appeals' remedy was improper because that court should have ordered the district court to vacate one of his two convictions and sentences. Thus, the narrow question presented by this case is whether a defendant who has received concurrent sentences for convictions under Section 922(h) and Section 1202(a), and will not suffer any adverse consequences as a result of being convicted for two offenses rather than one, is entitled nonetheless to the vacation of his conviction under Section 1202(a). Since petitioner did not seek the vacation of one of his convictions in the court of appeals and did not previously raise any claim directed against his multiple convictions (as opposed to cumulative punishment), he has failed to preserve this issue for review by this Court.

The rationale underlying petitioner's assertion that he is entitled to this relief is not entirely clear, but he appears to make two basic arguments. First, he asserts that a defendant cannot be prosecuted simultaneously under these two statutes for receipt and possession, and that the government may charge under only one of the provisions. This contention is incorrect. There is no constitutional or statutory bar to prosecution under the two statutes. Petitioner's second claim seems to be that his two convictions and concurrent sentences constitute multiple punishment prohibited by the Double Jeopardy Clause, even though the additional conviction has no identifiable collateral consequences. Although this issue has little practical significance, we believe that petitioner is incorrect

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or the possession of different weapons in different places (see *United States* v. *Vance*, 724 F.2d 517 (6th Cir. 1983), cert. denied, No. 83-6316 (Apr. 16, 1984)).

and that, moreover, adoption of petitioner's argument might call into question the validity of the concurrent sentence doctrine.[8]

I. PETITIONER'S CHALLENGE TO HIS TWO CONVICTIONS IS NOT PROPERLY BEFORE THIS COURT BECAUSE HE DID NOT RAISE THIS ISSUE IN THE COURTS BELOW

A petitioner may not ordinarily raise an issue in this Court that he failed to present to the lower courts. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).

Petitioner's motion under Fed. R. Crim. p. 35 in the district court challenged only the consecutive sentences imposed by the district court. It did not raise any objection to petitioner's convictions under the two statutes. In his motion for reconsideration filed after the district court's denial of this motion, petitioner requested only that the district court make his two sentences "run concurrently" (Motion for Reconsideration at 5)—the very relief ordered by the court of appeals.

[8] Petitioner erroneously asserts (Br. 13) that these issues were decided in *Taylor* v. *United States*, 449 U.S. 895 (1980). In *Taylor*, the defendant's *consecutive* sentences had been upheld by the court of appeals; the government conceded only that "it is unlikely that Congress intended to permit consecutive punishment in the circumstances" of that case and requested that "the case [be] remanded for further proceedings in light of [that] position" (80-5187 U.S. Memo. 3). Neither we nor this Court suggested that the government lacked the power to prosecute simultaneously under both statutes and obtain convictions and concurrent sentences for the two offenses.

Petitioner's argument in the court of appeals was similarly narrow. As that court observed, petitioner challenged "only the validity of the sentence imposed" (J.A. 37). He requested that the court of appeals either vacate one of the two sentences or order that the sentences run concurrently (C.A. Br. 14). Petitioner again did not seek the vacation of one of his convictions. In fact, one of the Fourth Circuit's decisions that petitioner relied upon in the court of appeals (*id.* at 10) specifically notes that the vacation of a sentence does not disturb the underlying conviction. *Goodson* v. *United States*, 564 F.2d 1071, 1073 & n.2 (4th Cir. 1977).

Moreover, petitioner did not previously make the substantive arguments upon which he now relies. He raised no objection in the district court to his simultaneous prosecution under Sections 922(h) and 1202(a). In the court of appeals, petitioner argued only that the sentences imposed by the district court resulted in improper cumulative punishment. He did not challenge his prosecution under the two provisions and did not even cite *United States* v. *Batchelder*, 442 U.S. 114 (1979), or the decisions of the courts of appeals that are the basis of his argument before this Court. Although petitioner relied upon the Double Jeopardy Clause in the courts below, he never contended that his two convictions constituted impermissible multiple punishment apart from the consecutive sentences or argued that less than complete relief would be provided by an order making his sentences concurrent.

Thus, petitioner seeks a remedy from this Court that he did not request in the court of appeals or the

district court on the basis of legal theories that were not presented to those courts. Since petitioner failed to raise these issues in the courts below, they should not be considered by this Court.

II. THE IMPOSITION OF SEPARATE CONCURRENT SENTENCES UPON PETITIONER FOR UNLAWFUL RECEIPT OF A FIREARM AND UNLAWFUL POSSESSION OF THE SAME FIREARM DOES NOT VIOLATE THE RELEVANT STATUTES OR THE DOUBLE JEOPARDY CLAUSE

A. The Government May Prosecute A Defendant For Both Unlawful Receipt Of A Firearm And Unlawful Possession Of The Same Firearm

This Court has long acknowledged the government's broad discretion regarding the conduct of criminal prosecutions, including its power to select the charges to be brought in a particular case. See *United States* v. *Goodwin*, 457 U.S. 368, 382 (1982); *United States* v. *Batchelder*, 442 U.S. at 124; *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-459 (1868). This settled rule is dispositive of petitioner's claim (Br. 5-10) that the government cannot proceed simultaneously under the two gun control statutes at issue in this case.

At the outset, it is clear that petitioner's reliance (Br. 5) upon the Double Jeopardy Clause and this Court's decision in *Blockburger* v. *United States*, 284 U.S. 299 (1932), is completely misplaced with respect to this point. In *Ohio* v. *Johnson*, No. 83-904 (June 11, 1984), this Court held that even where the Double Jeopardy Clause bars cumulative punishment for a group of offenses, "the Clause does not prohibit the State from prosecuting [the defendant]

for such multiple offenses in a single prosecution" (slip op. 7). Neither the interest in finality nor that in avoiding repetitive litigation is implicated when all related charges growing out of one incident are combined in a single proceeding, even if the charges are overlapping or mutually exclusive. See *United States* v. *McDaniel*, 538 F.2d 408, 414 (D.C. Cir. 1976). The Clause therefore presents no barrier to simultaneous prosecution under Sections 922(h) and 1202(a).

Similarly, there is no statutory bar to charging a defendant under these two provisions. In *United States* v. *Batchelder*, 442 U.S. 114, 118 (1979), the Court recognized the "partial redundancy" of Sections 922(h) and 1202(a), but it concluded that "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." The question before the Court in *Batchelder* was whether Section 1202(a) impliedly repealed Section 922(h) with respect to acts covered by both provisions. This Court found no such implied repeal, noting that both the statutory language and the legislative history clearly showed that both provisions were to be applied independently (442 U.S. at 118-121). The Court also rejected contentions that the Constitution would be violated if the two statutes were interpreted to encompass the same conduct (*id.* at 122-126).

Despite this Court's recognition of the independence of the two statutes, several courts of appeals have interpreted *Batchelder* to forbid the government from proceeding against a defendant, even in a single prosecution, under both Sections 922(h) and 1202(a). See *United States* v. *Girst*, 645 F.2d 1014, 1016-1017 (D.C. Cir. 1979); *United States* v. *Larson*, 625 F.2d

67, 69 (5th Cir. 1980); *United States* v. *Conn*, 716 F.2d 550, 552 (9th Cir. 1983).[4]

These courts have seized upon the observation in *Batchelder* that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants" (442 U.S. at 123-124), interpreting the reference to "either" statute to embody a requirement that the government elect to proceed under only one of the two provisions. This interpretation is incorrect. The passage was a response to the claim that the two statutes permitted excessive prosecutorial discretion because the government could select which of the two penalties would apply in a given case by proceeding under one statute or the other (442 U.S. at 122, 124). Thus, the reference to "either" statute was an affirmation of the government's *discretion* to charge under one statute rather than the other. It plainly was not intended to restrict the government to prosecuting for *only* a single offense—a question not present in the case—especially in view of *Batchelder*'s conclusion that the two statutes are "each fully enforceable on [their] own terms" (442 U.S. at 119).

[4] Because these conclusions were reached in post-trial appeals in which the only remedy afforded was vacation of one of the convictions, they are no more than dictum as applied to the propriety of charging and trying a defendant for both receipt and possession.

The Seventh Circuit's decision cited by petitioner (Br. 9), *United States* v. *Martin*, 732 F.2d 591 (1984), does not adopt the reasoning of these courts. The government conceded in *Martin* that cumulative punishment was not appropriate under the facts of the case, and the court did not indicate that there is any bar against simultaneous prosecution under the two statutes.

The government typically is permitted to prosecute a defendant under several related provisions at the same time. For example, in *United States* v. *Gaddis*, 424 U.S. 544, 550 (1976), this Court held that "there can be no impropriety for a grand jury to return an indictment or for a prosecutor to file an information containing counts charging violations of" several different provisions of the federal bank robbery statute where there is evidence to support the charges, even though the defendant could not in the end stand convicted of both offenses. Since *Batchelder* held that the decision whether to proceed under Section 922(h) or Section 1202(a) is no different from other charging decisions (442 U.S. at 125), the same rule must apply to prosecutions involving these provisions.[5]

The difference in the elements of and potential punishments for the two offenses provides a practical justification for permitting simultaneous prosecutions. The Section 922 receipt offense authorizes punishment of up to five years' imprisonment, while the maximum sentence for unlawful possession is two years. The point of *Batchelder* is that Congress has afforded the prosecutor the option to elect to prosecute for the more severe offense. But while it is true that a defendant could not actually possess a firearm without having at some time received it (un-

[5] The *Gaddis* Court's observation that convictions could not be obtained for both bank robbery and receipt of the proceeds of a bank robbery (424 U.S. at 550) does not support petitioner's argument that his convictions under Sections 922(h) and 1202(a) are improper. The conclusion in *Gaddis* was based upon the intent of Congress to reach different and mutually exclusive groups of wrongdoers under the two statutes. 424 U.S. at 547; see also *Heflin* v. *United States*, 358 U.S. 415, 420 (1959). Here, Congress recognized that the two provisions could apply to the same defendant. *United States* v. *Batchelder*, 442 U.S. at 119-122.

less he manufactured it himself), it does not follow that the ability to prove unlawful possession automatically ensures that unlawful receipt can also be proven. A defendant may be found in possession of a firearm, yet the circumstances surrounding his receipt of the firearm may be disputed. Thus, he may seek to raise a reasonable doubt as to whether, for example, the receipt offense occurred in a different venue or outside the period of the statute of limitations. In light of these possibilities, a prosecutor may reasonably conclude that he must safeguard his case by charging both offenses, so that if the proof fails on the more serious receipt offense, a conviction on the possession charge may still be obtained.[6] No legitimate interest of the defendant has been identified that would justify impaling the prosecutor on the horns of the dilemma created by a requirement of pretrial election.

B. In The Absence Of Cumulative Punishment, Petitioner's Two Convictions Violate No Constitutional Or Statutory Right

The government conceded and the court below found that the consecutive sentences imposed upon petitioner by the district court were not authorized by Congress. Under its power to issue a remedial order "just under the circumstances" (28 U.S.C. 2106), the court of appeals directed that the sentences be modified to run concurrently (J.A. 37-38). Petitioner now asserts (Br. 10-13) that the court of appeals was required in addition to order the district court to vacate one of his two convictions. The basis for this claim appears to be petitioner's belief that his two concurrent sentences constitute multiple punishment prohibited by the Double Jeopardy

[6] A later prosecution for possession following acquittal of receipt could often raise serious double jeopardy concerns.

Clause. Although vacation of a sentence and the underlying conviction is one method by which cumulative punishment can be eliminated, it is not the only permissible remedy. The court of appeals' action was wholly appropriate in the circumstances of this case.

The Double Jeopardy Clause contains three basic protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. *Pearce*, 395 U.S. 711, 717 (1969) (footnotes omitted). See also *Ohio* v. *Johnson*, slip op. 5; *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). Since petitioner has been subjected to only one prosecution, the only arguably relevant aspect of the Clause is its protection against multiple punishments for the same offense.

This Court has held that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983). See also *Ohio* v. *Johnson*, slip op. 6; *Albernaz* v. *United States*, 450 U.S. 333, 343-344 (1981). Here, by creating two offenses (see page 11, *supra*), Congress authorized the imposition of multiple convictions.[7] Moreover, petitioner's second

[7] Thus, this is not a situation in which multiple convictions are improper because there is a "merger" of two offenses, as is the case for entering a bank with intent to rob and bank robbery under 18 U.S.C. 2113(a) (see *Prince* v. *United States*, 352 U.S. 322 (1957)), or because Congress intended to reach different and mutually exclusive groups of wrongdoers under

conviction and concurrent sentence will not result in any additional "punishment."

This Court has held that fines and imprisonment are the types of punishment limited by the Double Jeopardy Clause. Thus, in *North Carolina* v. *Pearce*, 395 U.S. at 718, the Court found that a prison term longer than the statutory maximum or a fine greater than the maximum authorized by the statute would violate the guarantee against multiple punishment. More recently, in *Ohio* v. *Johnson*, *supra*, the Court stated that the protection against multiple punishment "is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature" (slip op. 6). See also *Missouri* v. *Hunter*, 459 U.S. at 366. The consistent emphasis in this Court's decisions upon "sentencing" and the actual punishment received by a defendant mandates the conclusion that the Clause is not violated by an additional conviction for which a court imposes a concurrent sentence, where there will be no effect upon the defendant's term of imprisonment.

In *Jeffers* v. *United States*, 432 U.S. 137 (1977), the Court recognized that a second conviction and concurrent sentence need not be vacated in order to eliminate cumulative punishment for two offenses. The petitioner in that case had been convicted of conspiracy to distribute drugs, in violation of 21 U.S.C. 846, and conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. 848. He was sentenced to the maximum punishment under each statute: 15 years in prison, a $25,000 fine, and a 3 year special parole term for

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the two statutes (see note 5, *supra*). Here, Congress intended to create two offenses and recognized that the two provisions could apply to the same defendant. *United States* v. *Batchelder*, 442 U.S. at 119-122.

the first offense, and life imprisonment and a $100,000 fine for the second offense.

The convictions were upheld despite the fact that they resulted from separate trials because the petitioner had waived the Double Jeopardy Clause's protection against successive prosecutions by requesting separate trials on the two charges. Turning to the sentences imposed, this Court found that Congress did not intend the two violations to be cumulatively punished and ordered that the $125,000 in fines imposed for the two offenses be "reduced so that the two fines together do not exceed $100,000," the maximum under the more severe statute (432 U.S. at 158) (plurality opinion). Significant for present purposes is the fact that this Court did not require that one of Jeffers' concurrent terms of imprisonment be vacated or that one of his two convictions be vacated; indeed, by stating that "the two fines together" could not exceed $100,000, the plurality made clear that vacation of one of the convictions was not required to eliminate the multiple punishment. See also *United States* v. *Rone*, 598 F.2d 564, 572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Ackerson*, 502 F.2d 300, 305-306 (8th Cir. 1974), vacated on other grounds, 419 U.S. 1099 (1975); *United States* v. *Jones*, 487 F.2d 676, 679 & n.1 (9th Cir. 1973); cf. *United States* v. *Nichols*, 731 F.2d 545, 547 (8th Cir. 1984), cert. denied, No. 83-6908 (Dec. 8, 1984); *United States* v. *Kaplan*, 588 F.2d 71, 75 (1978), modified on other grounds, 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Tankersley*, 492 F.2d 962, 969 (7th Cir. 1974).

Some courts of appeals have required the vacation of multiple convictions in these circumstances, citing the possible adverse consequences of an additional

conviction. *E.g., United States* v. *Buckley*, 586 F.2d 498, 504-505 (5th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *United States* v. *York*, 578 F.2d 1036, 1040 (5th Cir.), cert. denied, 439 U.S. 1005 (1978); *United States* v. *Slutsky*, 487 F.2d 832, 845 n.18 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974). These collateral consequences can include delay in the defendant's eligibility for parole,[8] an increased sentence under a recidivist statute for a future offense, the availability of the conviction to impeach the defendant's character or credibility in future proceedings, and the societal stigma resulting from the additional conviction. *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Sibron* v. *New York*, 392 U.S. 40, 54-56 (1968).

Petitioner does not even claim, however, that he will suffer any consequences from his second conviction and concurrent sentence, and it in fact seems certain that no such adverse effects will occur. The Parole Commission advises us that petitioner's prospects for parole will not be affected by an additional conviction because only a single firearm was involved and its unlawful possession was incident to its unlawful receipt. The record indicates that petitioner previously has been convicted of 58 offenses, of which at least one was a felony (Tr. 86). Whether one or two convictions exist for receipt and possession cannot reasonably be expected to affect petitioner's status under an habitual offender statute (see *United States* v. *Ramos Algarin*, 584 F.2d 562, 568 (1st Cir. 1978)). Finally, a conviction for possession of a firearm based on the same facts as his conviction for receipt of the firearm is not likely to impose any

[8] This factor will be eliminated after the implementation of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2 (Oct. 12, 1984), because that statute provides for determinate sentencing and eliminates the federal parole system.

additional stigma upon petitioner or provide additional grounds for impeachment, because of the close similarity between the offenses. See *United States* v. *Alessi*, 638 F.2d 466, 468-469 (2d Cir. 1980); *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978). Since the additional conviction and concurrent sentence will not adversely affect petitioner, they cannot constitute punishment within the meaning of the Double Jeopardy Clause,[9] and the court of appeals was not required to vacate one of petitioner's convictions.

While we believe, for the reasons discussed above, that a rule barring the entry of two convictions for offenses [redacted] is not required, we have no fundamental objection to such a rule because it will have no practical effect on the interests of the government or those of the defendant. However, we are concerned that a decision by this Court that such a rule is required in order to eliminate multiple punishment might unwisely burden the courts with difficult inquiries into the permissibility of cumulative punishment in cases in which only con-

[9] In fact, only additional imprisonment or fine would constitute punishment cognizable under the Double Jeopardy Clause. See *United States* v. *Johnson*, 709 F.2d 639, 642 (11th Cir. 1983), cert. denied, No. 83-5413 (Dec. 5, 1983). In *Gryger* v. *Burke*, 334 U.S. 728 (1948), this Court rejected the claim that a statute providing enhanced sentencing for habitual criminals subjected defendants to double jeopardy. It held that the "[t]he sentence as a * * * habitual criminal *is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes.* It is a stiffened penalty for the latest crime" (*id.* at 732 (emphasis added)). Thus, any additional penalty imposed upon a defendant when he is convicted of a future offense and any use of the conviction to impeach a defendant in a future proceeding would not constitute a second punishment for the present offense.

current sentences have been imposed and might even more generally call into question the validity of the concurrent sentence doctrine. The doctrine, which has long been recognized by this Court, holds that if a defendant receives concurrent sentences for two convictions and one of the convictions is upheld, there is "no occasion to review the conviction on the [other] count since * * * conviction on [one count] is sufficient to sustain the sentence." *Hirabayashi* v. *United States*, 320 U.S. 81, 105 (1943). See also *United States* v. *Romano*, 382 U.S. 136, 138 (1965); *Lawn* v. *United States*, 355 U.S. 339, 359 (1958); *Locke* v. *United States*, 11 U.S. (7 Cranch) 339, 344 (1813).[10]

This Court indicated in *Benton* v. *Maryland*, 395 U.S. at 790-792, that the propriety of applying the concurrent sentence doctrine was affected by whether the defendant would suffer adverse collateral effects as a result of the challenged but unreviewed conviction. The doctrine subsequently has been applied both in this Court (*Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973)) and in the courts of appeals, which have generally concluded that the concurrent sentence doctrine may be utilized if the defendant will not suffer adverse collateral consequences as a result of the affirmance of an additional conviction.[11]

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[10] The doctrine is a rule of judicial efficiency that permits a court to avoid deciding an issue when its decision will have no practical impact on the rights of the parties. The decision whether to utilize the doctrine is within the court's discretion. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

[11] *United States* v. *Gordon*, 634 F.2d 639, 543 (1st Cir. 1980); *United States* v. *Lampley*, 573 F.2d 783, 788 (3d Cir. 1978); *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 931 (4th Cir. 1980) (Russell & Hall, JJ., concurring and dissenting), cert. denied, 454 U.S. 1144 (1982); *United States* v. *Mullens*, 583 F.2d 134, 142 (5th Cir. 1978); *United States* v. *Grunsfeld*, 558 F.2d 1231 (6th Cir.), cert. denied, 434 U.S. 872 (1977); *United States* v. *Smith*, 601 F.2d 972, 973 (8th Cir.), cert. denied, 444 U.S. 879 (1979); *United States* v. *Hopkins*, 716 F.2d 739, 749 (10th Cir. 1982); *United States* v. *Johnson*, 700 F.2d 699, 701 (11th Cir. 1983). The Second Circuit has placed the burden on the government to show the absence of adverse collateral consequences. *United States* v. *Vargas*, 615 F.2d 952, 960 (2d Cir. 1980). Under the Seventh Circuit's, rule, the absence of collateral consequences will be found only in rare situations. *United States* v. *Peters*, 617 F.2d 503, 506 (7th Cir. 1980); *United States* v. *Tanner*, 471 F.2d 128, 140 (7th Cir. 1972).

The Ninth Circuit, the District of Columbia Circuit, and some panels of the Fifth Circuit have refused to apply this rule to affirm convictions because of their view that the task of determining whether a defendant will suffer adverse consequences is too difficult and time consuming to result in any gain in judicial efficiency. *United States* v. *De Bright*, 730 F.2d 1255 (9th Cir. 1984); *United States* v. *Hooper*, 432 F.2d 604 (D.C. Cir. 1970); *United States* v. *Dias*, 733 F.2d 371, 376 (5th Cir. 1984). The Ninth Circuit has held that the merits of a defendant's claim must be decided in every case; the District of Columbia Circuit has adopted the practice of vacating unreviewed convictions.

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The doctrine therefore rests on the premise that a second conviction and concurrent sentence can, in some situations, have no adverse consequences for a defendant. A decision by this Court that petitioner's second conviction must be vacated even though the conviction carries no adverse effects could be viewed as a determination that an additional conviction by itself is improper. That conclusion arguably conflicts with the justification for the concurrent sentence doctrine, because it indicates that an additional conviction is improper without regard to its collateral consequences.

The ends that the doctrine serves—the promotion of judicial efficiency and the conservation of scarce

judicial resources—continue to be important in light of the heavy workload of the courts of appeals. This Court therefore should not adopt a rule in this case that might undercut the validity of the concurrent sentence doctrine.

Since the court of appeals' remedy provided petitioner with all of the relief to which he is entitled under the relevant statutes or the Double Jeopardy Clause, this Court should not order the vacation of one of petitioner's convictions.[12]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1984

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[12] If this Court determines that vacation of one of the convictions is required, the choice should be left to the prosecution, which was initially free under *Batchelder* to elect which charge to press. We discuss the justifications for this remedy in another statutory context in our petition (at 20-24) in *United States* v. *Woodward*, No. 83-1947 (filed May 29, 1984). We have sent a copy of that petition to counsel for petitioner in this case.

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REPLY BRIEF

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(4)

No. 84-5004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TRUMAN LEWIS BALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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18

QUESTION PRESENTED FOR REVIEW

Is the United States permitted to convict and sentence a convicted felon under both 18 U.S.C. Sections 922(h)(1) and 1202(a)(1) where the unlawful receipt of the firearm under Section 922(h)(1) was incidental to unlawful possession of the same gun?

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REPLY BRIEF FOR PETITIONER

OPINIONS BELOW

The case is reported below as *United States* v. *Ball*, 734 F.2d 965 (4th Cir. 1984).

The case was tried to a jury and there is no official or unofficial report or opinion of the case in the district court.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The decision of the Court of Appeals here reviewed is dated May 8, 1984. The petition for a writ of certiorari was filed with the Clerk of this Court within 60 days after May 8, 1984 as required by Rule 20.1 of this Court.

The constitutional provisions and statutes which this case involves are:

UNITED STATES CONSTITUTION, AMENDMENT V:

. . . nor shall any person be subject for the same offence nor be twice put in jeopardy of life or limb; . . .

18 U.S.C. SECTION 922(h)(1)

It shall be unlawful for any person (1) . . . who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year; . . . to receive any firearm . . . which has been shipped or transported in interstate . . . commerce.

18 U.S.C. SECTION 924(a):

Whoever violates any provision of this chapter [which includes Section 922(h)(1)] . . . shall be fined not more than $5,000, or imprisoned not more than five years, or both . . .

18 U.S.C. APP. SECTION 1202(a)(1):

Any person who (1) has been convicted by a court . . . of a State . . . of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

The government's brief (Br. 3) raises some confusion about the procedural history of this case. Petitioner does not come to this Court by way of a Rule 35 motion as the government's brief suggests. This case is here from a direct appeal.

Petitioner filed his notice of appeal three weeks before he filed his Rule 35 motion. When the district court denied the motion, petitioner moved for reconsideration. The court requested the government to respond to petitioner's brief in support of reconsideration, which the government did, but the district court made no ruling.

Some months later, just prior to petitioner's oral argument before the Fourth Circuit, petitioner, who was then incarcerated under the present convictions, wrote to the district court, as the court had instructed him to do. (Tr. 88). Petitioner told the court of his successful completion of an alcoholic treatment program while in prison and of his good behavior while there, and asked the court to reduce his sentence. The court treated his letter as a second Rule 35 motion and overruled it in an order dated February 9, 1984.

The district court has never ruled, however, on petitioner's motion for reconsideration. Indeed, the government argued in the court of appeals that the appeal was premature for that reason. The court of appeals rejected

this argument and held that the district court was without jurisdiction to consider a Rule 35 motion once an appeal had been filed. (734 F.2d at 966). The government does not tender this ruling as a question presented for decision in its brief in this Court. Thus, this case involves the direct appeal of the judgment of conviction as defined in F.R. Crim. P. 32(b).

ARGUMENT

I.

PETITIONER'S CHALLENGE TO HIS CONVICTIONS AS WELL AS HIS SENTENCES IS PROPERLY BEFORE THIS COURT BECAUSE IT WAS PRESERVED IN THE COURT BELOW.

The government contends, (Br. 7) "Since petitioner did not seek the vacation of one of his convictions in the court of appeals and did not previously raise any claim directed against his multiple convictions (as opposed to cumulative punishment), he has failed to preserve this issue for review by this Court."

But petitioner did arise his claim against multiple convictions below, both in his notice of appeal and in his brief to the Fourth Circuit. The notice of appeal reads:

> Notice is hereby given that TRUMAN LEWIS BALL, . . . hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order finding defendant guilty of and sentencing him for violations of 18 U.S.C. Section 922 (h)(1) . . . and 18 U.S.C. Section 1202 (a)(1) . . .

The opening statement in Petitioner's brief before the Fourth Circuit reads: "From the convictions and sentences, Ball appeals." (Br. 5)

To have asked the Fourth Circuit to vacate one of petitioner's convictions would have been nothing more

than a gesture in futility, and a dangerous one besides, in view of *United States* v. *Burton*, 629 F.2d 975 (4th Cir. 1980). Burton had argued in his direct appeal (previous to the above-cited case, opinion unpublished) that his two convictions under 18 U.S.C. Sections 922 (h)(1) and App. 1202 (a)(1) violated his right against double jeopardy. "Those appeals were handled by a screening panel which found no merit in any of Burton's contentions and did not find the double jeopardy claim worthy of mention." *Burton*, at 977. The court in that prior appeal did not vacate one of Burton's convictions, but instead affirmed not only his convictions, but his sentences as well.

Wishing to avoid the same fate, and recognizing that certiorari to the Supreme Court is, at best, uncertain, petitioner, in the alternative, requested the remedy available to him under *Burton*, i.e., to have his sentences at least run concurrently. After saving his point, he knew a more formal request to have one of his convictions set aside would have to be made elsewhere. Thus, the sentence in his brief, "From the convictions and sentences, Ball appeals," was deliberately included to preserve this issue.

There was, likewise, no hope that the arguments he now makes under *United States* v. *Batchelder*, 442 U.S.C 114 (1979) could have succeeded in the court of appeals. *Burton* had already fixed the analysis of *Batchelder* for the Fourth Circuit. State decisions foreclosed further discussion to the panel. See, *Milanovich* v. *United States*, 365 U.S. 551, 553 (1960).

Relying on *United States* v. *Wilson*, 721 F.2d 1235 (4th Cir. 1983), a case decided after *Burton*, petitioner, principally asked the Fourth Circuit to expand the *Burton* remedy and to vacate one his sentences. See also, *United States* v. *Atkinson*, 512 F.2d 1235 (4th Cir. 1975);

United States v. *Crew*, 538 F.2d 575 (4th Cir. 1976); *Goodson* v. *United States*, 564 F.2d 1071 (4th Cir. 1977); *United States* v. *Southerland*, 565 F.2d 1281 (4th Cir. 1977).

Even this court refused to do, saying *Burton* had already decided there were no double jeopardy problems with the two statutes, 18 U.S.C. Section 922 and App. 1202. Since the court of appeals could not even set aside one of his sentences, it certainly would not have vacated one of his convictions.

Petitioner's argument, under *Blockburger* v. *United States*, 284 U.S. 296 (1932) were raised in the court of appeals when he discussed the *Wilson* case. (Br. 11) The government took no issue with *Wilson* but accepted its reasoning and urged the court under *Wilson* to "vacate the *entire* sentence and remand for resentencing," (Br. 6) (Emphasis supplied). The government's contention now, that *Blockburger* does not apply, is, therefore, contrary to what it argued below.

Petitioner's omission of the two words "and convictions" at page 14 of his brief below does not deprive the Court of the benefit of a full argument on which to decide this case. *Batchelder* and *Blockburger*, are the basis for his claim that the United States cannot convict and sentence under both 18 U.S.C. Sections 922 (h)(1) and App. 1202 (a)(1) where receipt was incidental to possession of the same gun.

Both cases have been fully briefed here by both petitioner and the government. Both cases have been fully considered and discussed by the Fourth Circuit. That court detailed its interpretation of *Batchelder* in *Burton*. It ruled below in essence that the effect of *Blockburger* on the case at bar was also controlled by *Burton*.

Other courts of appeals have fully considered and thoughtfully discussed the effect of *Batchelder* on multiple convictions under these two statutes for a single act. *United States* v. *Larson*, 625 F.2d 67 (5th Cir. 1980); *United States* v. *Girst*, 645 F.2d 1014 (D.C. Cir. 1979); *United States* v. *Ivy*, 644 F.2d 479 (5th Cir. 1981); *United States* v. *Wiga*, 662 F.2d 1325 (9th Cir. 1981).

For these reasons, petitioner should not now be barred from challenging his convictions as well as his sentences. But even if only his sentences can be considered, we submit, petitioner is still entitled to proceed with his case.

II.

THIS COURT HAS DECIDED THE QUESTION PRESENTED HERE IN THE SUMMARY DISPOSITION OF *TAYLOR* v. *UNITED STATES*.

The government argues that *Taylor* v. *United States*, 449 U.S. 895 (1980) did not decide the present issues because the only concession it made in its *Taylor* memorandum was "it is unlikely that Congress intended to permit consecutive punishment," (Br. 8, n.3)

On remand in *Taylor*, the Third Circuit recognized the concession recited above as it relates only to consecutive punishment, 635 F.2d at 233-34. But with the benefit of the full memorandum before it, as opposed to the single sentence provided here, the Third Circuit construed the government's position to go much farther. That court said:

> Although the Solicitor General's memorandum is not entirely clear on the matter, we understand the government's position to be that receipt and continuous possession thereafter constitutes a single offense for which only a single sentence may be imposed. 635 F.2d at 234.

The court vacated the judgment and remanded for resentencing.

Taylor shows that the government, in spite of what it now says, accepted as correct the Third Circuit's interpretation of its position. If this were not so, it certainly would have complained that the Third Circuit did not faithfully execute the Supreme Court's mandate.

Petitioner respectfully submits the government conceded the sentencing issue in *Taylor*.

III

TO ALLOW PETITIONER'S TWO CONVICTIONS TO STAND WHEN CONGRESS HAS NOT AUTHORIZED PYRAMIDING OF PENALTIES UNDER SECTIONS 922 (h)(1) AND APP. 1202 (a)(1) WOULD BE TO VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The government's response to this argument is, "The government may prosecute a defendant for both . ." (Br. 10)

Petitioner has no interest in whether the prosecutor must elect either to proceed under Section 922 or under 1202. There was no motion made in his case requesting election; nor is this issue within the scope of the writ of certiorari as granted.

Petitioner's discussion of the question was to demonstrate how the courts of appeals have interpreted *United States* v. *Batchelder*, 442 U.S. 114 (1978) and how by interpreting *Batchelder* to mean the prosecutor may not proceed under both statutes for a single act, those courts then concluded a defendant could not be convicted and sentenced under both statutes.

The evidence was sufficient to support a verdict of either receipt or possession, against petitioner. But there

was no showing of receipt independent from his continuous possession. In similar circumstances some courts have required the government to elect. See, e.g. *Abney* v. *United States*, 431 U.S. 651 (1976) (Third Circuit required election of either conspiracy or attempt); *United States* v. *Square*, 516 F.Supp. 28 (E.D. Va.19) (prosecutor forced to elect either 922 (h) or 1202 (a)). When election is required, any error can be fully corrected on appeal by vacating the convictions and sentences under that court. *United States* v. *Gaddis*, 424 U.S. 544, 549 (1975).

Other courts have said it is within the prosecutor's discretion to proceed on one or the other, but if he chooses to proceed on both, then the court must solve the multiplicity problem. At that point, the court, in its discretion, and not the prosecutor, determines under which statute to convict and to sentence. *United States* v. *Wiga*, 662 F.2d 1325, 1333-4 (9th Cir. 1981); *United States* v. *Larson*, 625 F.2d 67, 69 (5th Cir. 1980); *United States* v. *Girst*, 645 F.2d 1014 (D.C. Cir. 1979); *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984). Each of the just cited cases were remanded with instructions to vacate one of the convictions and one of the sentences.

Thus, petitioner's remedy now is the same whether the government is required to elect or not.

The government next says *Batchelder* rejected contentions that the Constitution would be violated if Sections 922 and App. 1202 encompassed the same conduct (Br. 11). This is only partially true. *Batchelder* held that neither due process notice requirements nor Equal Protection would be violated when the same conduct violated both statutes, but made no mention of double jeopardy or *Blockburger* claims. Since *Batchelder* had been convicted and sentenced under only Section 922 no double jeopardy or *Blockburger* issues were before the Court.

The government says it conceded in *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984) that "cumulative punishment was not appropriate under the facts of this case." (Br. 12, n.4). What it actually conceded according to the Seventh Circuit's opinion was "that one of the defendant's convictions must be vacated." at 592.

The government states, "Here by creating two offenses (see page 11, supra) Congress authorized the imposition of multiple convictions." (Br. 15) But this Court said in *Pereira* v. *United States*, 347 U.S. 1, 9 (1953):

> . . . Sections 1341 and 2314 of Title 18 constitute two separate offenses, and a defendant may be convicted of both even though the charges arise from a single act or series of acts, so long as each requires the proof of a fact not essential to the other, *Gravieres* v. *United States*, 220 U.S. 338; *Blockburger* v. *United States*, 284 U.S. 299.

The government's only response to *Blockburger*, is that it does not bar prosecution of multiple offenses in a single proceeding. The answer begs the question, but there is no other answer.

There is no reason other than *Blockburger* for the government to have conceded in this case that consecutive sentences were illegal; or in *Taylor*, that receipt and continuous possession thereafter is a single offense for which only a single sentence may be imposed; or in *Martin*, that one of defendant's convictions must be vacated.

Whether cited or not, the rule comes from *Blockburger*, as the Court recently pointed in *Albernaz* v. *United States;* 450 U.S. 333 (1981):

> Our decision in *Whalen* was not the first time this Court has looked to the *Blockburger* rule to determine whether Congress intended that the two

was no showing of receipt independent from his continuous possession. In similar circumstances some courts have required the government to elect. See, e.g. *Abney* v. *United States*, 431 U.S. 651 (1976) (Third Circuit required election of either conspiracy or attempt); *United States* v. *Square*, 516 F.Supp. 28 (E.D. Va.19) (prosecutor forced to elect either 922 (h) or 1202 (a)). When election is required, any error can be fully corrected on appeal by vacating the convictions and sentences under that court. *United States* v. *Gaddis*, 424 U.S. 544, 549 (1975).

Other courts have said it is within the prosecutor's discretion to proceed on one or the other, but if he chooses to proceed on both, then the court must solve the multiplicity problem. At that point, the court, in its discretion, and not the prosecutor, determines under which statute to convict and to sentence. *United States* v. *Wiga*, 662 F.2d 1325, 1333-4 (9th Cir. 1981); *United States* v. *Larson*, 625 F.2d 67, 69 (5th Cir. 1980); *United States* v. *Girst*, 645 F.2d 1014 (D.C. Cir. 1979); *United States* v. *Martin*, 732 F.2d 591 (7th Cir. 1984). Each of the just cited cases were remanded with instructions to vacate one of the convictions and one of the sentences.

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> Our decision in *Whalen* was not the first time this Court has looked to the *Blockburger* rule to determine whether Congress intended that the two

> statutory offenses be punished cumulatively. We previously stated in *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977) . . . "[t]he established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in *Blockburger* v. *United States*, . .

The Court's application of the test focuses on the statutory elements of the offense. *Iannelli* v. *United States*, 420 U.S. 770, 785, n.17 (1975). The elements of Sections 922 are identical to the elements of 1202 in this case because the government never proved a receipt independent from defendant's possession. The proof was the same for both offenses. Therefore, on the facts of this case the government cannot convict and sentence under both statutes. One of petitioner's convictions and one of his sentences must be vacated.

The legislative history requires no different conclusion. Just prior to the passage of the Gun Control Act, Congress amended Section 924, the penalty provision for 922, to include 924 (c). The (c) amendment contained "in addition to", classic language to indicate Congress' intent to impose cumulative punishment. *Missouri* v. *Hunter*, 459 U.S. 359, (1982). Had Congress wished to make 924 (a) a cumulative punishment statute, it could easily have inserted a similar amendment simultaneously. That Congress has not done so is persuasive evidence of legislative intent. *United States* v. *Wilson*, 721 F.2d 1235 (4th Cir. 1983).

The remaining arguments in Section II A of the government's brief, while possibly valid in another setting, have no factual predicate here.

IV

BECAUSE DEFENDANT'S EXCESSIVE CONVICTION AND SENTENCE IMPOSE ADVERSE COLLATERAL LEGAL CONSEQUENCES BOTH SHOULD BE VACATED IN SPITE OF THE CONCURRENT SENTENCE DOCTRINE.

The government states, "The consistent emphasis in this Court's decisions upon "sentencing" and the actual punishment received by a defendant mandates the conclusion that the clause is not violated by an additional conviction for which a court imposes a concurrent sentence, where there will be no effect on the defendant's term of imprisonment." (Br. 16)

This formulation of the concurrent sentence doctrine cannot stand in view of the Courts decisions in *Sibron* v. *New York*, 392 U.S. 40 (1968); *Street* v. *New York*, 394 U.S. 576 (1969); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Carafas* v. *LaValee*, 391 U.S. 234 (1968).

If as the government says, sentences and actual punishment were the consistent emphasis of the Court then these four cases should have been barred, not merely because of the concurrent sentence doctrine, which after *Benton* v. *Maryland*, 395 U.S. 784 (1969) is no longer a jurisdictional bar, but because moot and not justiciable. Each of the four cases involved a defendant who had been released from confinement or probation before his appeal reached the Court. If sentences and actual punishment were the emphasis then each would present no case or controversy to decide as required by Art. III Section 2 of the United States Constitution.

Even after their sentences had expired and even though there was no effect on their term of imprisonment, the Court rejected arguments that their claims were moot and nonjusticiable. The Court found that adverse legal consequences resulted from convictions alone.

It is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences. *Benton*, at 790.

Petitioner's home is in Honaker, Virginia. He lives only about 40 miles from Tennessee, North Carolina, Kentucky and West Virginia, all of which are within an hour's drive of his home. It is likely that he will be in and out of these states frequently during his life. Of these states West Virginia and North Carolina have habitual offenders statutes which would take into account these convictions. Petitioner might some day in these or some other state have both his convictions counted against him under such statute.

Both petitioner's convictions might some day be used to impeach his character. To require him to explain to a jury the subtlety of multiple convictions for a single act when even the courts of appeals cannot agree about their effect is to ask the impossible of him.

Everytime he takes the witness stand he will be put to his proof about these convictions. It will surely damage his effectiveness as a witness as the prosecutor diverts the jury's attention from the case to this collateral issue.

An excessive conviction can only hurt him in any future sentencing proceeding.

His concurrent sentence also has adverse consequences. If he should get into trouble before having served two years of his sentence and if his probation should be revoked he would have to serve the additional two years now suspended in favor of probation. A real possibility exists that his time in prison would be extended.

He should thus not have to endure these consequences which, but for the concurrent sentence doctrine, violate

his right against double jeopardy, just for the sake of judicial economy.

THE GOVERNMENT HAS TACITLY CONCEDED THIS CASE.

When the government's admission that it "has no fundamental objection to the rule [barring the entry of two convictions] for it will have no practical effect on the interests of the government or the defendant" (Br. 19) is taken together with its admission that "it is true that a defendant could not actually possess a firearm without having at some time received it" (Br. 13), we submit the government has tacitly conceded this case.

CONCLUSION

The case should be remanded to the district court with instructions to vacate one of Petitioner's convictions and one of his sentences.

Respectfully submitted,

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